

EXHIBIT A - Potter Dep

Dr. Michael Potter 01/09/2018

1 UNITED STATES DISTRICT COURT	1 ----- I N D E X -----
2 SOUTHERN DISTRICT OF NEW YORK	2 WITNESS EXAMINATION BY PAGE
3 -----X	3 MICHAEL POTTER MR. OSTOJIC 5
4 JOANNE HART and AMANDA PARKE, on behalf	4
5 of themselves and all others similarly	5
6 situated,	6 ----- E X H I B I T S -----
7 Plaintiffs,	7 EXHIBIT DESCRIPTION FOR I.D.
8 -against-	8 Exhibit 1 Expert Report of Dr. 9
9 BHH, LLC d/b/a BELL & HOWELL, and VAN	9 Michael Potter
10 HAUSER, LLC,	10 Exhibit 2 Rebuttal Report of Dr. 10
11 Defendants.	11 Michael Potter
12 -----X	12 Exhibit 3 Documents 64
13 888 Seventh Avenue	13 Exhibit 4 Documents 137
14 New York, New York	14 Exhibit 5 Document 201
15 January 9, 2018	15
16 9:30 a.m.	16
17 Deposition of DR. MICHAEL POTTER, before	17 (EXHIBITS TO BE PRODUCED)
18 Shari Cohen, a Notary Public of the State of New	18
19 York.	19
20	20
21	21
22	22
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25	25
1	3
1 A P P E A R A N C E S:	1 S T I P U L A T I O N S
2	2
3 LEAHY, EISENBERG & FRAENKEL, LTD.	3 IT IS HEREBY STIPULATED AND AGREED by
4 Attorneys for Plaintiffs	4 and between the attorneys for the respective
5 33 W. Monroe Street, Suite 1100	5 parties herein, that the filing, and sealing
6 Chicago, Illinois 60603	6 of the within deposition be waived.
7 BY: ROBERT OSTOJIC, ESQ.	7 IT IS FURTHER STIPULATED AND AGREED
8 PHONE 312-368-4554	8 that all objections, except as to the form of
9 EMAIL ro@lefltd.com	9 the question, shall be reserved to the time
10	10 of the trial.
11	11 IT IS FURTHER STIPULATED AND AGREED
12 BURSOR & FISHER, P.A.	12 that the within deposition may be sworn to
13 Attorneys for Defendants	13 and signed before any officer authorized to
14 888 Seventh Avenue	14 administer an oath with the same force and
15 New York, New York 10019	15 effect as if signed and sworn to before the
16 BY: YITZCHAK KOPEL, ESQ.	16 Court.
17 PHONE 646-837-7127	17
18 EMAIL ykoppel@bursor.com	18
19	19 -ooo-
20	20
21 ALSO PRESENT:	21
22 MICHAEL WEISS, ESQ. - Via Telephone	22
23 DR. PAUL BORTH - Via Telephone	23
24 DR. PHIL WHITFORD - Via Telephone	24
25	25
2	4



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<p>1 MICHAEL POTTER, called as a 2 witness, having been duly sworn by a 3 notary public, was examined and 4 testified as follows: 5 6 EXAMINATION BY 7 MR. OSTOJIC: 8 Q. Sir, would you please state 9 your name for the record? 10 A. Michael Fred Potter. 11 Q. You are here, Dr. Potter, as an 12 expert witness on behalf of the plaintiffs in 13 a case Joanne Hart and Sandra Bueno on behalf 14 of themselves and all others similarly 15 situated persons versus BHH doing business as 16 Bell & Howell, case number 2015-cv-4804 in 17 the United States District Court, Southern 18 District of New York, correct? 19 A. Correct. 20 Q. Have you given a deposition 21 before? 22 A. Yes. 23 Q. How many times? 24 A. Roughly 15. 25 Q. In what capacity did you give</p>	<p>1 POTTER 2 along, but if at any time you don't 3 understand one of my questions, please state 4 so and I'll try to rephrase it, okay? 5 A. Yes. 6 Q. If you give an answer to a 7 question, I'll assume you understood my 8 question, fair? 9 A. Fair. 10 Q. Because obviously we both have 11 flights out of New York tonight, I will try 12 to move as quickly as possible so I would ask 13 that you directly answer the question I pose, 14 okay? 15 A. I'll do my best. 16 Q. If you need to elaborate on 17 something, just please answer first the 18 question and let me know if you want to add 19 something and obviously if it's okay with 20 your attorney, we can do that, okay? 21 A. Okay. 22 Q. You have issued two written 23 reports in this case as an expert, correct? 24 A. Correct. 25 Q. Your first report is dated</p>
5	7
<p>1 POTTER 2 those depositions? 3 A. Sometimes on the defense side 4 of cases and sometimes on the plaintiff side. 5 Q. Have you ever testified in 6 court? 7 A. Yes, I have. 8 Q. How many times? 9 A. From memory about three to 10 four. 11 Q. Have you testified in court as 12 an expert witness or as a lay person? 13 A. Expert witness. 14 Q. Have you ever been barred from 15 testifying in court? 16 A. No. 17 Q. Have you had any of your 18 opinions in any way limited or barred by any 19 court? 20 A. No. 21 Q. I'm obviously going to be 22 asking you some questions. I will need you to 23 verbalize your responses, okay? 24 A. Okay. 25 Q. I will try to move things</p>	<p>1 POTTER 2 October 31, 2017, correct? 3 A. Correct. 4 Q. And then you had a rebuttal 5 report dated December 22, 2017, correct? 6 A. Correct. 7 Q. Those two reports include all 8 of your opinions and the bases for those 9 opinions, correct? 10 A. Other than any opinions that I 11 might express in the deposition today of 12 course. 13 Q. Are you intending on giving 14 opinions today that are not found in your two 15 written reports? 16 A. If I'm asked questions that are 17 not related to work that I have done in my 18 reports or if I'm asked an interpretation of 19 work or statements made in my reports. 20 Q. Do you have any right now 21 opinions that are not found in your two 22 written reports with respect to this case? 23 A. Not without hearing questions 24 from you that might suggest new ground or 25 areas that I need to elaborate on.</p>
6	8



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<p>1 POTTER</p> <p>2 (Exhibit 1, Expert Report of</p> <p>3 Dr. Michael Potter, marked for</p> <p>4 Identification.)</p> <p>5 Q. Sir, I marked here as expert</p> <p>6 Deposition Exhibit number 1 and I agreed with</p> <p>7 counsel that with respect to the expert</p> <p>8 witnesses in this case we would go ahead and</p> <p>9 designate the exhibits starting from</p> <p>10 obviously 1 and proceed down the line so I</p> <p>11 would like you to take a look at Exhibit 1</p> <p>12 and tell me is that your report dated October</p> <p>13 31, 2017?</p> <p>14 A. Yes, it appears to be what I</p> <p>15 submitted.</p> <p>16 Q. So it has your written report</p> <p>17 and it includes six appendices, correct?</p> <p>18 A. Correct. This last -- let me</p> <p>19 just take a quick check here. It appears</p> <p>20 that the last -- I don't know if this is a</p> <p>21 full exhibit. I can't recall whether this</p> <p>22 last portion which is appended as an exhibit</p> <p>23 was included with my report or provided by</p> <p>24 counsel.</p> <p>25 MR. KOPEL: I believe it's not</p> <p>9</p>	<p>1 POTTER</p> <p>2 appended to this.</p> <p>3 Q. I want to go back to Exhibit</p> <p>4 number 1 and I will probably go through that</p> <p>5 exhibit first, okay?</p> <p>6 A. Okay.</p> <p>7 Q. I just want to make sure we</p> <p>8 both are clear on what all the appendices</p> <p>9 were to the first report Exhibit number 1,</p> <p>10 okay?</p> <p>11 A. Okay.</p> <p>12 Q. Appendix 1 is your curriculum</p> <p>13 vitae, right?</p> <p>14 A. Correct.</p> <p>15 Q. That's a true and complete copy</p> <p>16 of all of your qualifications and experiences</p> <p>17 as an expert witness?</p> <p>18 A. Yes.</p> <p>19 Q. Appendix number 2 is</p> <p>20 essentially just numbers and some data,</p> <p>21 correct?</p> <p>22 A. Of Richard Mankin's acoustical</p> <p>23 testing of the Bell & Howell device.</p> <p>24 Q. Appendix 2 is data that was</p> <p>25 provided to you by Dr. Mankin, correct, Dr.</p> <p>11</p>
<p>1 POTTER</p> <p>2 an appendix to the report.</p> <p>3 Q. Let me then on the record let</p> <p>4 me remove that part and right now what you</p> <p>5 are holding and we'll just put that in the</p> <p>6 record as Exhibit 1, that's your complete</p> <p>7 October 31, 2017 report with all of the</p> <p>8 appendices, correct?</p> <p>9 A. Correct.</p> <p>10 (Exhibit 2, Rebuttal Report of</p> <p>11 Dr. Michael Potter, marked for</p> <p>12 Identification.)</p> <p>13 Q. Let me show you what we're</p> <p>14 marking as Deposition Exhibit number 2. It's</p> <p>15 titled Rebuttal Report of Dr. Michael F.</p> <p>16 Potter dated December 22, 2017. Would you</p> <p>17 confirm for me whether that in deed is your</p> <p>18 December 22, 2017 rebuttal report?</p> <p>19 A. Yes, it is.</p> <p>20 Q. The rebuttal report had a list</p> <p>21 of publications, but I don't think there was</p> <p>22 anything else designated as an appendix to</p> <p>23 the rebuttal, correct?</p> <p>24 A. The publications was appendix</p> <p>25 1. I don't believe there was anything else</p> <p>10</p>	<p>1 POTTER</p> <p>2 Richard Mankin?</p> <p>3 A. Actually there were two</p> <p>4 devices.</p> <p>5 Q. Then appendix 3 is also some</p> <p>6 data. Is that also from Dr. Mankin?</p> <p>7 A. That's correct.</p> <p>8 Q. Then appendix number 4 is a</p> <p>9 report from i2L, correct?</p> <p>10 A. Correct.</p> <p>11 Q. i2L did testing of the Bell &</p> <p>12 Howell ultrasonic repeller devices with</p> <p>13 respect to insects, certain insects, correct?</p> <p>14 A. Correct. For simplicity of this</p> <p>15 deposition when I refer to insects, I mean</p> <p>16 arthropods because spiders technically are</p> <p>17 not insects and spiders were included in that</p> <p>18 so if that's okay I'll just keep saying</p> <p>19 insects and know we are talking about a</p> <p>20 report here that also included spiders.</p> <p>21 Q. Also for simplicity sometimes</p> <p>22 I'll be saying Bell & Howell device or</p> <p>23 repeller, obviously I'm talking about devices</p> <p>24 which are the subject matter of this lawsuit</p> <p>25 unless we state otherwise, fair?</p> <p>12</p>



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1 POTTER
2 A. Fair.
3 Q. Then appendix number 5 to your
4 first report is a report from Sierra,
5 correct?
6 A. Correct, Sierra Research Labs.
7 Q. Sierra did testing on the Bell
8 & Howell devices with respect to mice,
9 correct?
10 A. Correct.
11 Q. Then appendix number 6 is a
12 list of the materials you reviewed in this
13 case, correct?
14 A. Correct.
15 Q. I want to first go over
16 appendix number 1 of Exhibit number 1 which
17 is your CV, okay?
18 A. Okay.
19 Q. You hold several degrees in
20 entomology, correct?
21 A. Correct.
22 Q. What is entomology?
23 A. The study of insects.
24 Q. Since 1991 you have been
25 employed by the University of Kentucky within

13

1 POTTER
2 the department of entomology, correct?
3 A. Correct.
4 Q. Do you hold any degrees in
5 animal behavior?
6 A. No.
7 Q. Are you a rodentologist?
8 A. Rodentologist is a very
9 specific term much like an entomologist who
10 deals specifically with the study of rodents.
11 I consider myself to be both an entomologist
12 and an urban pest management expert and urban
13 pest management at least from my experiences
14 have involved rodents as well as insects.
15 Q. Would you consider yourself a
16 rodentologist though?
17 A. By the definition that it's an
18 individual that specifically has spent their
19 career dedicated to the study of rodents, no,
20 but from the standpoint of do I have
21 tremendous experience working with rodents
22 and their management, yes.
23 Q. So what is a rodent scientist?
24 A. I don't know if there is such a
25 term, but I would assume it would mean

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1 POTTER
2 someone again who dedicates their career
3 working specifically on studies involving
4 rodents.
5 Q. Have you ever used the term
6 rodent scientist?
7 A. For myself?
8 Q. No, just in general for anyone?
9 A. No.
10 Q. Would you consider yourself a
11 rodent scientist?
12 MR. KOPEL: Objection, lack of
13 foundation.
14 A. Again, I'm not familiar with --
15 that term is not one that's widely used.
16 There is probably only a handful of
17 rodentologists in the United States that have
18 dedicated their careers to working
19 exclusively with rodents and I'm certainly
20 not within that group, but as I said, I've
21 spent the better part of my professional
22 career working with pests which infest
23 buildings and certainly insects and rodents
24 are probably the two largest groups that do
25 that.

15

1 POTTER
2 Q. Do you hold any degrees in
3 wildlife behavior?
4 A. No, I do not.
5 Q. Are you a mammalogist?
6 A. No, I'm not.
7 Q. Prior to being employed with
8 the University of Kentucky in 1991 you did
9 work in the private sector, correct?
10 A. Correct.
11 Q. I think you have listed in your
12 curriculum vitae your experience, right?
13 A. Yes.
14 Q. So from 1982 to 1985 you were
15 an employee of Union Carbide Agricultural
16 Products Company, correct?
17 A. Correct.
18 Q. What products if any did Union
19 Carbide manufacture at that time while you
20 were an employee?
21 A. Union Carbide Corporation
22 manufactured insecticides, herbicides,
23 fungicides and plant growth regulators.
24 Q. Did you work within the
25 agricultural section of Union Carbide?

16



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<p>1 POTTER</p> <p>2 A. I worked in a variety of</p> <p>3 sections. It's the agricultural products</p> <p>4 company, but within that umbrella my job</p> <p>5 responsibilities were evaluating insecticides</p> <p>6 for use in agriculture, in animal health and</p> <p>7 urban entomology and forestry, basically</p> <p>8 anywhere where there could be a pest</p> <p>9 insecticide that could potentially be</p> <p>10 utilized on.</p> <p>11 Q. Did Union Carbide between 1982</p> <p>12 and 1985 manufacture any consumer products?</p> <p>13 A. Yes.</p> <p>14 Q. What were the consumer products</p> <p>15 that Union Carbide manufactured between 1982</p> <p>16 and 1985?</p> <p>17 A. The most notable one is Sevin</p> <p>18 also known as Carbaryl.</p> <p>19 Q. Is that an insecticide?</p> <p>20 A. Yes, it is.</p> <p>21 Q. Is that used in agricultural</p> <p>22 farms?</p> <p>23 A. It's used in both agricultural</p> <p>24 uses as well as for household uses.</p> <p>25 Q. Union Carbide essentially was</p> <p style="text-align: right;">17</p>	<p>1 POTTER</p> <p>2 by lethal?</p> <p>3 Q. In other words, they were</p> <p>4 poisons like an insecticide or a pesticide?</p> <p>5 A. From recollection, yes.</p> <p>6 Q. From 1988 to 1991 you worked at</p> <p>7 Orkin Pest Control, correct?</p> <p>8 A. Correct.</p> <p>9 Q. You mention something about an</p> <p>10 IPM program while working at Orkin Pest.</p> <p>11 What's the IPM programs?</p> <p>12 A. IPM programs are -- IPM stands</p> <p>13 for integrated pest management. It's</p> <p>14 basically a philosophy of managing pests</p> <p>15 using a variety of techniques based on</p> <p>16 inspection, prescribing the appropriate</p> <p>17 solution using both chemical and non-chemical</p> <p>18 techniques, but I did a lot more at Orkin</p> <p>19 than that.</p> <p>20 I was the national technical</p> <p>21 director for the company and basically was</p> <p>22 responsible for all technical decisions of</p> <p>23 the company.</p> <p>24 Q. Did Orkin between 1988 and 1991</p> <p>25 manufacture any consumer products that it</p> <p style="text-align: right;">19</p>
<p>1 POTTER</p> <p>2 purchased by Rhone-Poulenc?</p> <p>3 A. Rhone-Poulenc, a French</p> <p>4 company.</p> <p>5 Q. So you worked for this French</p> <p>6 company that bought out Union Carbide between</p> <p>7 1985 and 1988, correct?</p> <p>8 A. Correct.</p> <p>9 Q. Essentially the same products</p> <p>10 that were manufactured by Union Carbide still</p> <p>11 were manufactured by this new French company</p> <p>12 that purchased Union Carbide?</p> <p>13 A. Yes and then Rhone-Poulenc had</p> <p>14 some of their own products. If I could back</p> <p>15 up, the products that I worked with between</p> <p>16 1982 and 1985 when I was in research and</p> <p>17 development were experimental materials, they</p> <p>18 were not yet registered, but we evaluated</p> <p>19 those products on a wide variety of insect</p> <p>20 pests in both urban environments as well as</p> <p>21 agricultural and animal health and forestry.</p> <p>22 Q. Were all of the products that</p> <p>23 you worked on while at Union Carbide and</p> <p>24 Rhone-Poulenc essentially lethal products?</p> <p>25 A. Can you clarify what you mean</p> <p style="text-align: right;">18</p>	<p>1 POTTER</p> <p>2 would sell to the general public?</p> <p>3 A. We had a distributorship where</p> <p>4 we were a formulator of materials. I can't</p> <p>5 recall whether we sold to consumers as well</p> <p>6 as to just the branches and offices within</p> <p>7 Orkin.</p> <p>8 Q. Then in your CV which is</p> <p>9 appendix 1 to Exhibit 1 you indicate the nine</p> <p>10 things that you do while employed with the</p> <p>11 University of Kentucky since 1991, correct?</p> <p>12 A. Those are not all the things I</p> <p>13 do, but they are certainly some of the more</p> <p>14 notable things that I have spent my time on.</p> <p>15 Q. Are you a salaried employee at</p> <p>16 the university?</p> <p>17 A. Yes, I am.</p> <p>18 Q. Is it fair to say that since</p> <p>19 1991 you have not been employed by anyone</p> <p>20 else other than the University of Kentucky,</p> <p>21 fair?</p> <p>22 A. I have done outside consulting,</p> <p>23 but as far as a full-time employee, no.</p> <p>24 Q. Have you ever been hired by the</p> <p>25 plaintiff's law firm prior to this case?</p> <p style="text-align: right;">20</p>



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<p>1 POTTER</p> <p>2 A. For this particular case?</p> <p>3 Q. Prior to this case for other</p> <p>4 cases?</p> <p>5 MR. KOPEL: You are referring</p> <p>6 to Bursor & Fisher, correct?</p> <p>7 MR. OSTOJIC: Yes.</p> <p>8 A. No.</p> <p>9 Q. Have you ever worked with</p> <p>10 counsel next to you before on any other</p> <p>11 cases?</p> <p>12 A. No.</p> <p>13 Q. How were you contacted in this</p> <p>14 case?</p> <p>15 A. My recollection is I was</p> <p>16 contacted by Yitzchak Kopel.</p> <p>17 Q. Do you recall when the first</p> <p>18 contact was made?</p> <p>19 A. It's just a guesstimate from</p> <p>20 memory, but about a year and change ago.</p> <p>21 Q. I gather since 1991 you have</p> <p>22 been hired by companies that make</p> <p>23 insecticides, correct?</p> <p>24 A. Correct.</p> <p>25 Q. You have also been hired by</p> <p style="text-align: right;">21</p>	<p>1 POTTER</p> <p>2 Q. Where anybody out in the public</p> <p>3 could buy it, in other words, it's not</p> <p>4 specific to simply one group?</p> <p>5 A. I don't believe so.</p> <p>6 Q. Have you designed any product</p> <p>7 that was ultimately sold to consumers?</p> <p>8 A. I assisted in designing a</p> <p>9 product that is being marketed to the</p> <p>10 professional pest control industry currently.</p> <p>11 Q. Is that product a pesticide?</p> <p>12 A. No.</p> <p>13 Q. What kind of product is it?</p> <p>14 A. It's a resistance management</p> <p>15 kit or a detection kit primarily for bed bugs</p> <p>16 determining whether they have a resistance or</p> <p>17 susceptibility to insecticides.</p> <p>18 Q. Is that product currently on</p> <p>19 the market?</p> <p>20 A. Yes, it is.</p> <p>21 Q. Who is it being sold to?</p> <p>22 A. The primary target is the</p> <p>23 professional pest control industry.</p> <p>24 Q. What's the name of the product?</p> <p>25 A. Well, I think it's Black Out</p> <p style="text-align: right;">23</p>
<p>1 POTTER</p> <p>2 companies that make pesticides, correct?</p> <p>3 A. Correct.</p> <p>4 Q. How much of your income do you</p> <p>5 estimate comes from your consulting work?</p> <p>6 MR. KOPEL: Objection, calls</p> <p>7 for speculation.</p> <p>8 A. It would be a guesstimate, but</p> <p>9 it varies year to year, but perhaps a third.</p> <p>10 Q. What is your salary at the</p> <p>11 University of Kentucky, annual salary?</p> <p>12 A. It's approximately 122,</p> <p>13 125,000.</p> <p>14 Q. Do you then receive a 1099 from</p> <p>15 any companies that you do consulting work</p> <p>16 for?</p> <p>17 A. Yes.</p> <p>18 Q. Have you maintained those 1099</p> <p>19 records?</p> <p>20 A. Yes.</p> <p>21 Q. Have you ever personally</p> <p>22 designed a product that was ultimately sold</p> <p>23 to the general public?</p> <p>24 A. Can you clarify what you mean</p> <p>25 by the general public?</p> <p style="text-align: right;">22</p>	<p>1 POTTER</p> <p>2 Resistance Detection Kit or Insecticide</p> <p>3 Testing Kit. I'm sorry, Lab In A Bag I think</p> <p>4 is the branded name that they gave it.</p> <p>5 Q. Are you the sole designer of</p> <p>6 that product?</p> <p>7 A. No.</p> <p>8 Q. Have you ever personally</p> <p>9 manufactured a product that was sold to the</p> <p>10 public?</p> <p>11 A. No.</p> <p>12 Q. Have you ever been involved in</p> <p>13 marketing a product that was sold to the</p> <p>14 public?</p> <p>15 A. Not to my recollection.</p> <p>16 Q. Do you know if there is any</p> <p>17 written standards in the U.S. that have to be</p> <p>18 followed before a product is sold in the</p> <p>19 U.S.?</p> <p>20 A. Can you clarify when you say</p> <p>21 product; are you talking about an insecticide</p> <p>22 or just a product in general?</p> <p>23 Q. Just a product in general?</p> <p>24 A. No, I'm not familiar.</p> <p>25 Q. Are you familiar with any</p> <p style="text-align: right;">24</p>



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<p>1 POTTER</p> <p>2 written standards in the U.S. where a</p> <p>3 non-lethal product has to abide by before</p> <p>4 it's sold to the general public?</p> <p>5 A. Can you restate the</p> <p>6 question?</p> <p>7 Q. Do you know of any written</p> <p>8 standards in the U.S. that have to be</p> <p>9 followed before a non-lethal product is sold</p> <p>10 to the general public?</p> <p>11 A. That's not my area of</p> <p>12 expertise. I have some knowledge of devices</p> <p>13 and so forth in terms of EPA requiring</p> <p>14 efficacy data and statements, but it's really</p> <p>15 not my area of expertise.</p> <p>16 Q. Is it fair to say that the EPA</p> <p>17 governs the sale of lethal products such as</p> <p>18 insecticides and pesticides?</p> <p>19 MR. KOPEL: Objection, calls</p> <p>20 for a legal conclusion.</p> <p>21 A. They certainly do regulate the</p> <p>22 sale and registration of insecticides, but</p> <p>23 they also regulate the sale of devices, in</p> <p>24 other words, non-pesticidal materials.</p> <p>25 Q. Have you ever had to advise any</p> <p>25</p>	<p>1 POTTER</p> <p>2 devices for monitoring and detection of</p> <p>3 insect populations.</p> <p>4 Q. Is that bed bugs that you are</p> <p>5 referring to?</p> <p>6 A. That's the one that comes to</p> <p>7 mind, yes.</p> <p>8 Q. I'll ask this, but, well, is it</p> <p>9 correct that you haven't dealt with any</p> <p>10 products to be sold to the general public</p> <p>11 other than in some degree with respect to</p> <p>12 either insecticides or the detection of bed</p> <p>13 bugs; is that fair?</p> <p>14 A. Can you repeat the question.</p> <p>15 Q. Sure. I gather that your</p> <p>16 involvement to whatever degree it is with</p> <p>17 respect to any products that are ultimately</p> <p>18 to be sold to the public is limited to either</p> <p>19 insecticides or the detection of bed bugs,</p> <p>20 correct?</p> <p>21 A. I'm not sure that's entirely</p> <p>22 true. Again, I'm asked so many questions</p> <p>23 from so many different entities, both basic</p> <p>24 manufacturers and even individuals who want</p> <p>25 to develop something and it's not as narrow</p> <p>27</p>
<p>1 POTTER</p> <p>2 clients with respect to the specifics of any</p> <p>3 industry practice to sell a consumer product</p> <p>4 in the U.S.?</p> <p>5 A. Can you restate the question.</p> <p>6 Q. Have you ever been retained to</p> <p>7 advise a client with respect to any industry</p> <p>8 practices within the U.S. in order to sell a</p> <p>9 consumer product in the U.S.?</p> <p>10 A. If I'm interpreting your</p> <p>11 question correctly, I have consulted and</p> <p>12 provided advice to basic manufacturers of</p> <p>13 insecticides about the markets that they work</p> <p>14 in and the effectiveness of various products</p> <p>15 and what's necessary to develop a product for</p> <p>16 those sorts of uses.</p> <p>17 Q. Is it fair to say that the</p> <p>18 advice you have given to clients as an expert</p> <p>19 with respect to any products is limited to</p> <p>20 insecticides?</p> <p>21 A. No.</p> <p>22 Q. What other products have you</p> <p>23 given clients advice to in selling those</p> <p>24 products in the U.S. other than insecticides?</p> <p>25 A. One that comes to mind is</p> <p>26</p>	<p>1 POTTER</p> <p>2 as that.</p> <p>3 I mean as recently as a few</p> <p>4 months ago I was asked about developing a</p> <p>5 device to capture carpenter bees so I get</p> <p>6 asked by consumers, I get asked by the</p> <p>7 professional pest control industry, by</p> <p>8 manufacturers and it involves both pesticidal</p> <p>9 and non-pesticidal methods of control.</p> <p>10 Q. What non-pesticidal methods of</p> <p>11 control are you referring to?</p> <p>12 A. Traps, monitoring devices,</p> <p>13 vacuums, heat treatments, heaters so for the</p> <p>14 physical killing or removal of insects.</p> <p>15 Q. Can you identify any products</p> <p>16 that are currently being sold in the U.S.</p> <p>17 that you have either designed, manufactured,</p> <p>18 marketed or worked on to aid in the sale of</p> <p>19 that product?</p> <p>20 A. I believe so, yes.</p> <p>21 Q. What product?</p> <p>22 A. I had quite a bit of</p> <p>23 involvement with heat treatments for bed bug</p> <p>24 control.</p> <p>25 Q. What's the product for that</p> <p>28</p>



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<p>1 POTTER</p> <p>2 heat treatment?</p> <p>3 A. One was a -- the commercial</p> <p>4 brand of the product or the concept?</p> <p>5 Q. Is it a product that you are</p> <p>6 referring to that's being sold?</p> <p>7 A. It's a system of treating with</p> <p>8 heaters to eradicate bed bugs.</p> <p>9 Q. Your work with respect to a</p> <p>10 consumer product?</p> <p>11 A. When you say consumer product,</p> <p>12 sold to the professional pest control</p> <p>13 industry or to a house holder?</p> <p>14 Q. Either way, I'll accept either</p> <p>15 one?</p> <p>16 A. To the professional pest</p> <p>17 control industry I have had input on heat</p> <p>18 treatment technology, I had input on vacuum</p> <p>19 cleaners for removal of bed bugs. I probably</p> <p>20 had others, but I would have to think</p> <p>21 carefully because I've worked in a lot of</p> <p>22 different pests over the years.</p> <p>23 Q. Are you advising clients on</p> <p>24 concepts of how to rid either homes or</p> <p>25 commercial settings of pests or are you</p> <p style="text-align: right;">29</p>	<p>1 POTTER</p> <p>2 those industry practices are located in any</p> <p>3 written form?</p> <p>4 A. Those practices are mandated by</p> <p>5 U.S. Environmental Protection Agency so</p> <p>6 there's probably a great deal of data</p> <p>7 requirements that can be found in terms of</p> <p>8 what the agrochemical company is required to</p> <p>9 do to register their products.</p> <p>10 Q. I take it when you talk about</p> <p>11 the EPA you are talking about it regulates</p> <p>12 insecticides and pesticides, correct?</p> <p>13 A. And they also regulate devices</p> <p>14 intended to kill, repel or control pests.</p> <p>15 Q. Is it your understanding that</p> <p>16 the EPA governs, for instance, ultrasonic</p> <p>17 pest repellers?</p> <p>18 A. I believe that's correct, yes.</p> <p>19 Q. What's the basis for that</p> <p>20 conclusion?</p> <p>21 A. It's my understanding that the</p> <p>22 EPA regulates all products whether it's a</p> <p>23 chemical or whether it's a physical device</p> <p>24 that controls, repels, captures insects. I</p> <p>25 think it would be in the federal register,</p> <p style="text-align: right;">31</p>
<p>1 POTTER</p> <p>2 working on the actual product that's being</p> <p>3 sold?</p> <p>4 A. Primarily the former, but a bit</p> <p>5 of the latter.</p> <p>6 Q. Are you familiar then with any</p> <p>7 industry practices in the U.S. for a</p> <p>8 manufacturer before a product is sold in the</p> <p>9 U.S.?</p> <p>10 A. Restate the question.</p> <p>11 Q. Sure. Are you aware of any</p> <p>12 industry practices in the U.S. that a</p> <p>13 manufacturer has to follow before a product</p> <p>14 is sold in the U.S.?</p> <p>15 MR. KOPEL: Objection, vague.</p> <p>16 A. Yes.</p> <p>17 Q. What are those industry</p> <p>18 practices?</p> <p>19 A. They would basically relate to</p> <p>20 the agrochemical industry and development of</p> <p>21 insecticides and registering those products,</p> <p>22 toxicology studies, environmental studies,</p> <p>23 stability of formulations. This goes back to</p> <p>24 my chemical industry days.</p> <p>25 Q. Could you point to me where</p> <p style="text-align: right;">30</p>	<p>1 POTTER</p> <p>2 but they have a specific area where they talk</p> <p>3 about the requirements for regulation of</p> <p>4 ultrasonic devices as well as other types of</p> <p>5 devices so, in other words, they don't just</p> <p>6 regulate pesticides.</p> <p>7 Q. You believe the EPA also</p> <p>8 regulates non-lethal products?</p> <p>9 A. Correct, that's my belief. I'm</p> <p>10 not an expert in this area, but that's my</p> <p>11 understanding.</p> <p>12 Q. In your report Exhibit number 1</p> <p>13 you listed one deposition that you gave in</p> <p>14 the last four years, correct?</p> <p>15 A. Correct.</p> <p>16 Q. You indicate I think earlier</p> <p>17 that you have given approximately a dozen</p> <p>18 depositions, right?</p> <p>19 A. Something like that, yes.</p> <p>20 Q. Is it fair to say because you</p> <p>21 didn't include those other 11 or so</p> <p>22 depositions you are not necessarily relying</p> <p>23 upon anything you did in those other 11</p> <p>24 depositions for this case here?</p> <p>25 A. Correct, but those were also I</p> <p style="text-align: right;">32</p>



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<p>1 POTTER</p> <p>2 think more than five years ago, that's why</p> <p>3 they were -- because I'm not relying on this</p> <p>4 one that I mentioned either for this case,</p> <p>5 but I stated it because I was in the past</p> <p>6 five years.</p> <p>7 Q. Do you have a list though of</p> <p>8 the depositions you have given in your</p> <p>9 career?</p> <p>10 A. Not a list, no. I would have</p> <p>11 to go back to files and hunt through some of</p> <p>12 which I save and many of which I don't.</p> <p>13 Q. Have you retained any of the</p> <p>14 transcripts that you have given in the past?</p> <p>15 A. I may have. I'm not sure. I</p> <p>16 tend to purge files, but occasionally I'll</p> <p>17 save something.</p> <p>18 Q. I'm going over still your CV</p> <p>19 which is appendix 1 of Exhibit 1 where it</p> <p>20 shows publications, book chapters on page 4,</p> <p>21 do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. These publications, they all</p> <p>24 deal with bed bugs or termites, correct?</p> <p>25 A. No, that's not correct.</p> <p style="text-align: right;">33</p>	<p>1 POTTER</p> <p>2 typically with a conference. These are</p> <p>3 submitted proceedings like a paper, often a</p> <p>4 research paper that is reviewed by those that</p> <p>5 assemble the proceedings of the conference</p> <p>6 and publish it in some bound form. Today a</p> <p>7 lot of it is online, but it goes down as</p> <p>8 proceedings of a conference.</p> <p>9 For example, I just did one for</p> <p>10 the Intellectual Conference of Urban Pests</p> <p>11 that was in Birmingham, England last year.</p> <p>12 Q. I did review some of your</p> <p>13 publications and proceedings and it appears</p> <p>14 that since 2000 most of the work you have</p> <p>15 done relates to bed bugs; is that fair?</p> <p>16 A. Certainly in terms of</p> <p>17 publication, that's been the squeaky wheel so</p> <p>18 I would say that's correct, but I have</p> <p>19 published in some other areas. I just</p> <p>20 published an article on Brown Marmorated</p> <p>21 Stink Bug. I have to look through this, but</p> <p>22 I think it's a fair statement that certainly</p> <p>23 in the last 10 or 12 years most of my</p> <p>24 research publications have involved bed bugs.</p> <p>25 Q. Is it also fair to say that in</p> <p style="text-align: right;">35</p>
<p>1 POTTER</p> <p>2 Q. Which one of the publications</p> <p>3 that you have for book chapters does not deal</p> <p>4 with either termites or bed bugs?</p> <p>5 A. Well, first of all, if we are</p> <p>6 just talking about book chapters, the last</p> <p>7 publication biting and stinging pests in the</p> <p>8 Entomological Society of America Handbook of</p> <p>9 Turfgrass Insects involved pests such as</p> <p>10 stinging insects, biting insects, wasps,</p> <p>11 bees, fire ants, ticks, things like that.</p> <p>12 The others under book chapters</p> <p>13 did involve bed bugs and termites. I thought</p> <p>14 you were referring to the journal articles as</p> <p>15 well.</p> <p>16 MR. OSTOJIC: Off the record.</p> <p>17 (Discussion off the record.)</p> <p>18 Q. Sir, I'm now looking at the</p> <p>19 subtitle here on your CV Journal Articles and</p> <p>20 Proceedings, do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. What does that mean</p> <p>23 proceedings?</p> <p>24 A. Proceedings are published</p> <p>25 articles that were written associated with --</p> <p style="text-align: right;">34</p>	<p>1 POTTER</p> <p>2 the last 10 to 12 years most of your</p> <p>3 consulting work has revolved around bed bugs?</p> <p>4 A. No, that's not correct.</p> <p>5 Q. What percentage would you say</p> <p>6 your consulting work has been devoted to bed</p> <p>7 bugs in the last 10 to 12 years?</p> <p>8 A. When I define consulting work,</p> <p>9 that would encompass expert work.</p> <p>10 MR. OSTOJIC: Let's go off the</p> <p>11 record.</p> <p>12 (Discussion off the record.)</p> <p>13 A. Expert witness work, speaking</p> <p>14 at conferences, advising companies on</p> <p>15 products and methods so how much of it</p> <p>16 involved bed bugs, was that your question,</p> <p>17 maybe 60 percent.</p> <p>18 Q. Then I'm on page 10 of your CV</p> <p>19 where it has here patents. Are you with me</p> <p>20 on patents?</p> <p>21 A. Yes.</p> <p>22 Q. It includes such two patent</p> <p>23 numbers, correct?</p> <p>24 A. Correct.</p> <p>25 Q. The first one has an assignee</p> <p style="text-align: right;">36</p>



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<p>1 POTTER</p> <p>2 of Novartis Corp.?</p> <p>3 A. Novartis Corporation, yes.</p> <p>4 Q. What is that patent?</p> <p>5 A. This was a patent that I was a</p> <p>6 primary author on when I worked in the</p> <p>7 agrochemical industry basically developing a</p> <p>8 certain class of insecticides that had</p> <p>9 effectiveness against parasites in animals,</p> <p>10 fleas, flies, mites, lice. Basically</p> <p>11 parasites that feed on the outside of an</p> <p>12 animal and also parasites that work</p> <p>13 internally.</p> <p>14 Q. What is the second patent here</p> <p>15 mentioned microfabricated surfaces?</p> <p>16 A. That was a co-patent with</p> <p>17 professors at University of California Irvine</p> <p>18 developing fabricated surfaces designed to</p> <p>19 entrap bed bugs so biomimicry basically.</p> <p>20 Q. Was there a product that was</p> <p>21 actually manufactured based on that patent?</p> <p>22 A. Not yet. If I might add</p> <p>23 because you asked me about my publications</p> <p>24 and maybe I didn't clarify, but if you look</p> <p>25 at the totality of my publications, I've</p> <p style="text-align: right;">37</p>	<p>1 POTTER</p> <p>2 of that?</p> <p>3 A. No.</p> <p>4 Q. The privilege log essentially</p> <p>5 included -- the general gist of it was</p> <p>6 communications between you and plaintiffs'</p> <p>7 counsel concerning this case, okay?</p> <p>8 A. Okay.</p> <p>9 Q. I take it then everything in</p> <p>10 your file other than those documents that</p> <p>11 have been withheld pursuant to that privilege</p> <p>12 log have been produced; is that correct?</p> <p>13 A. Correct.</p> <p>14 Q. Is there anything that was a</p> <p>15 part of your file in this case that was</p> <p>16 removed other than what was in the privilege</p> <p>17 log and not produced?</p> <p>18 A. Could you restate the question.</p> <p>19 Q. At any time during your work on</p> <p>20 this case, has there ever been a document</p> <p>21 that was removed from your file and not</p> <p>22 produced to at least plaintiffs' counsel?</p> <p>23 A. Not to my knowledge, no.</p> <p>24 Q. Appendix number 6 of Exhibit 1</p> <p>25 has essentially a list of I guess they are</p> <p style="text-align: right;">39</p>
<p>1 POTTER</p> <p>2 published work on mosquitoes, I've published</p> <p>3 work on various outdoor pests, I've published</p> <p>4 work on ants, but certainly again as you I</p> <p>5 believe asked as part of your question in the</p> <p>6 last 10 or 12 years it was primarily bed bugs</p> <p>7 and I have written extensively on other pests</p> <p>8 as well, but not in peer reviewed research</p> <p>9 journals.</p> <p>10 Q. I want to make sure that I have</p> <p>11 a complete copy of your file so I do want to</p> <p>12 go over appendix number 6 of Exhibit 1 which</p> <p>13 is the list of materials that you considered</p> <p>14 in this case, okay?</p> <p>15 A. Okay.</p> <p>16 Q. Did you receive a Subpoena to</p> <p>17 produce your file for this case?</p> <p>18 A. Yes.</p> <p>19 Q. Have you produced your entire</p> <p>20 file on this case to at least counsel for the</p> <p>21 plaintiffs?</p> <p>22 A. Yes.</p> <p>23 Q. We were provided with a</p> <p>24 privilege log of some documents that were</p> <p>25 being withheld from production. Are you aware</p> <p style="text-align: right;">38</p>	<p>1 POTTER</p> <p>2 either articles, some of them are power point</p> <p>3 presentations, correct?</p> <p>4 A. Yeah, most of them are research</p> <p>5 articles.</p> <p>6 Q. Starting on page 5 of appendix</p> <p>7 number 6, it has the First Amended Complaint</p> <p>8 for this case, correct?</p> <p>9 A. Correct.</p> <p>10 Q. Then it has documents which</p> <p>11 were Bates stamped BHH and you have examined</p> <p>12 those documents with those Bates stamped</p> <p>13 numbers, correct?</p> <p>14 A. Correct.</p> <p>15 Q. You did not attend any</p> <p>16 depositions in this case, correct?</p> <p>17 A. Correct.</p> <p>18 Q. Did you receive any abstracts</p> <p>19 or summaries of depositions in this case?</p> <p>20 A. I received a copy of Ms.</p> <p>21 Feuerstein's deposition.</p> <p>22 Q. It was the actual deposition</p> <p>23 transcript from Ms. Feuerstein, correct?</p> <p>24 A. I believe that's correct.</p> <p>25 Q. Is that the only deposition you</p> <p style="text-align: right;">40</p>



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1 **POTTER**
2 received in this case?
3 A. The only deposition, yes. I
4 read some excerpts from depositions in some
5 of the other documents, I think in some of
6 the reports of the experts for the defense,
7 but as far as deposition transcripts, that's
8 the only one.
9 Q. Then you examined a Bates stamp
10 from Ms. Feuerstein's deposition which was
11 Bates stamped Feuerstein 55 to 100, correct?
12 A. Correct.
13 Q. Obviously you reviewed the
14 reports which were attached to your first
15 report Exhibit number 1 the appendices 2 to 5
16 and the associated data and videos, correct?
17 A. Can you show me what you are
18 talking about?
19 Q. The last item?
20 A. Yes.
21 Q. So appendix 6 is a complete
22 copy of all or a listing of all the documents
23 you reviewed in this case, correct?
24 A. Correct.
25 Q. I take it then you didn't read

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1 **POTTER**
2 the deposition of Joanne Hart, correct?
3 A. May I back up, please. You are
4 referring to Exhibit 1, these are attachments
5 to that from my original report. I believe
6 there are some additional reference citations
7 that I included in my rebuttal report that
8 were not in this.
9 Q. I understand that. We'll get
10 to the rebuttal as well. You didn't review
11 Joanne Hart's deposition, correct?
12 A. Correct.
13 Q. You didn't review Sandra
14 Bueno's deposition, correct?
15 A. Correct.
16 Q. You didn't review Jeffrey
17 Mishan's deposition, correct?
18 A. Correct.
19 Q. Have you talked at all with
20 Joanne Hart?
21 A. No.
22 Q. You have talked at all with
23 Sandra Bueno?
24 A. No.
25 Q. Did you ever make any request

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1 **POTTER**
2 to speak to either Joanne Hart or Sandra
3 Bueno?
4 MR. KOPEL: Request to whom?
5 Q. To anyone?
6 MR. KOPEL: I want to caution
7 you communications with counsel are
8 privilege so you should not reveal the
9 content of any communications with
10 counsel. If you can answer that
11 question without doing so, then fine,
12 but if answering the question would
13 require you to do so, then I would
14 instruct you not to answer.
15 A. Can you repeat the question?
16 Q. Sure. Did you ever seek to
17 interview either Joanne Hart or Sandra Bueno
18 as part of your work in this case?
19 A. No.
20 MR. KOPEL: I just want to use
21 the restroom.
22 MR. OSTOJIC: I'm fine. Let's
23 take a two or five minute break.
24 (Recess taken.)
25 Q. Sir, have you ever had any

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1 **POTTER**
2 discussions with an Amanda Parke?
3 A. No.
4 Q. The file materials we received
5 in this case did not include all of the
6 articles, publications, power points that you
7 have listed in appendix 6 of Exhibit 1, do
8 you know why?
9 A. I assume that you are asking
10 for my file and these are all articles that
11 are readily accessible in the public domain
12 so I guess I just didn't assume that they
13 would be deemed file materials of what you
14 were requesting.
15 Q. Did you have any assistance in
16 gathering these articles, publications or
17 power points that you have listed in appendix
18 6?
19 A. No, but I think one or two I
20 might have gotten through inter-library loan
21 so when you say assistance, no, I gathered
22 the articles and there were a few that I
23 requested that I could not find myself with
24 the assistance of a librarian.
25 Q. The only two articles that we

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<p>1 POTTER</p> <p>2 received as part of your file in this case</p> <p>3 were two publications by Huang and</p> <p>4 Subramanyam, are you aware of that?</p> <p>5 A. No, I don't know which files</p> <p>6 you were provided by counsel.</p> <p>7 Q. Are all of the publications and</p> <p>8 articles that you have listed in appendix 6,</p> <p>9 are they printed and part of your file?</p> <p>10 A. They are readily available</p> <p>11 online. I thoroughly read and reviewed all</p> <p>12 these articles and I guess it's an</p> <p>13 interpretation of what you mean by my file,</p> <p>14 but I assumed since these are all widely</p> <p>15 available online, find them, I thoroughly</p> <p>16 read every one. There's a lot of details in</p> <p>17 them that are pertinent to this case which I</p> <p>18 basically tried to summarize in my reports.</p> <p>19 Q. I haven't been able to find any</p> <p>20 of these articles online.</p> <p>21 A. You have to know how to search</p> <p>22 I guess. I would have assumed that your two</p> <p>23 experts would have been able to help you with</p> <p>24 that.</p> <p>25 Q. So when you searched and found</p> <p style="text-align: right;">45</p>	<p>1 POTTER</p> <p>2 case to you?</p> <p>3 A. Could you repeat the question.</p> <p>4 Q. Do you know if these entities,</p> <p>5 i2L, Sierra and Dr. Mankin produced their</p> <p>6 entire files for this case to you?</p> <p>7 A. I received their reports.</p> <p>8 whether there were other items that you would</p> <p>9 consider their file I'm not sure.</p> <p>10 Q. Sir, are you aware of any</p> <p>11 written standards for the testing of consumer</p> <p>12 products?</p> <p>13 A. No.</p> <p>14 Q. Are you aware of any written</p> <p>15 standards for the testing of consumer</p> <p>16 products that determine their effectiveness?</p> <p>17 MR. KOPEL: Objection. What do</p> <p>18 you mean by written standards?</p> <p>19 Q. Do you know what written</p> <p>20 standards means? I'll use your definition.</p> <p>21 A. No. Could you give me yours</p> <p>22 because written standards means a lot of</p> <p>23 different things and at least in some of the</p> <p>24 cases I have been involved with in terms of</p> <p>25 standards of practice and best practices so</p> <p style="text-align: right;">47</p>
<p>1 POTTER</p> <p>2 these articles online, you didn't print them</p> <p>3 out, you just read them online?</p> <p>4 A. No, some I printed out, some I</p> <p>5 read online. For example, I'm sure you could</p> <p>6 find National Association of Home Builders</p> <p>7 website that talks about the average size of</p> <p>8 a room in the United States or a kitchen. A</p> <p>9 number of these were actually accessible</p> <p>10 through Google Scholar online and some I</p> <p>11 think required additional searching, but</p> <p>12 these are all real research articles by real</p> <p>13 people.</p> <p>14 Q. Are you aware that we issued</p> <p>15 Subpoenas to Dr. Mankin, i2L and Sierra for</p> <p>16 their file materials?</p> <p>17 A. I can't recall if I was copied</p> <p>18 on that or not, but I can't recall actually</p> <p>19 whether that's how that was done and whether</p> <p>20 I was copied or not. I thought I remember</p> <p>21 getting e-mails that I was copied on, but I</p> <p>22 can't recall.</p> <p>23 Q. Do you know if those entities</p> <p>24 referring to i2L, Sierra and Dr. Mankin</p> <p>25 produced their entire file materials in this</p> <p style="text-align: right;">46</p>	<p>1 POTTER</p> <p>2 if you could clarify.</p> <p>3 Q. Do you know of any written</p> <p>4 standards out there in your field of</p> <p>5 expertise with respect to the testing of a</p> <p>6 consumer product?</p> <p>7 MR. KOPEL: Same objection.</p> <p>8 A. Well, there are certain</p> <p>9 standards, for example, the EPA requires some</p> <p>10 laboratories depending on the studies and</p> <p>11 what it's being used for to use what they</p> <p>12 call good laboratory practices where they</p> <p>13 have to retain records and their labs have to</p> <p>14 be set up in a specific way documenting</p> <p>15 things carefully so there are standards like</p> <p>16 that through some government agencies, but</p> <p>17 I'm not an expert in that area.</p> <p>18 Q. Do you need expertise to design</p> <p>19 the testing of a product to determine its</p> <p>20 efficacy?</p> <p>21 A. Absolutely.</p> <p>22 Q. What kind of expertise do you</p> <p>23 need?</p> <p>24 MR. KOPEL: Objection, vague.</p> <p>25 A. Depends on the product.</p> <p style="text-align: right;">48</p>



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1 POTTER
2 Q. What about for ultrasonic
3 repellers?
4 A. So can you please repeat the
5 question in that context?
6 Q. What kind of expertise do you
7 need if any to design the testing of an
8 ultrasonic repellent to determine its
9 efficacy?
10 MR. KOPEL: Objection, vague.
11 A. Are you talking about an
12 ultrasonic repeller to control pests; I
13 assume so, I'm sorry, so if we are talking
14 about ultrasonic pest repellers, you would
15 need expertise in the biology and the habits
16 of the pest that it was targeted for whether
17 that be insects or rodents or nuisance
18 wildlife, birds. You would need expertise in
19 how to set up a proper experimental design so
20 you could evaluate whether the effects that
21 you were seeing were real or by coincidence.
22 The answer is you would really
23 need to have somebody who had some biological
24 background because science is a broad field.
25 If they were a mechanical engineer, that

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1 POTTER
2 certainly would not be sufficient to set up
3 studies on living organisms and the effect of
4 repellent devices.
5 Q. Would you also need expertise
6 to actually conduct a test that's being
7 designed to test the efficacy of an
8 ultrasonic pest repeller?
9 A. Could you repeat the question?
10 MR. OSTOJIC: Could you read
11 that back.
12 (Record read.)
13 A. As I'm interpreting your
14 question I would say yes for the reasons I
15 said before.
16 Q. How about would you also need
17 expertise to evaluate the data or the results
18 of any testing of an ultrasonic pest repeller
19 to determine its efficacy?
20 A. Certainly you would need the
21 expertise as a scientist and a biologist to
22 evaluate those products. You wouldn't
23 necessarily have to be an expert on each
24 individual organism, but because some of
25 these principals of evaluating these devices

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1 POTTER
2 can cross species, for example, I would not
3 have to necessarily be an expert on flies to
4 evaluate an ultrasonic repeller's effect on
5 flies although it would be helpful to have an
6 understanding of the biology and habits of
7 flies so basically you have to be a biologist
8 if you're evaluating the effects of these
9 devices on living organisms.
10 Q. I know you examined the
11 documents of testing that was performed on
12 the Bell & Howell devices by Intertek,
13 correct?
14 A. Correct.
15 Q. You also examined the documents
16 of testing on the Bell & Howell devices that
17 was performed by SGS, correct?
18 A. Correct.
19 Q. You also examined documents
20 relating to the testing of the Bell & Howell
21 devices that was done by Qmann, correct?
22 A. Correct.
23 Q. All three of those entities
24 after completing their tests concluded that
25 the Bell & Howell devices were effective to

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1 POTTER
2 repel the enumerated pests, correct?
3 A. That was their conclusion,
4 correct.
5 Q. I know you disagree with the
6 conclusion, right?
7 A. Yes.
8 Q. We'll get to that, but I just
9 wanted to first make sure we are on the same
10 page with respect to those three entities and
11 their testing. Do you know of any testing
12 performed on the Bell & Howell devices before
13 2017 other than those that were performed by
14 Intertek, SGS and Qmann?
15 A. Not to my knowledge, no. There
16 may have been because those devices according
17 to Feuerstein's deposition have been utilized
18 and sold by other manufacturers as well, but
19 I don't know if those tests were done by
20 these companies or by others.
21 Q. Have you had any contact with
22 anyone from Intertek?
23 A. No.
24 Q. Have you had any contact with
25 anyone from SGS?

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1 POTTER
2 A. No.
3 Q. Have you had any contact with
4 anyone from Qmann?
5 A. No.
6 Q. Have you done any research with
7 respect to the qualifications of Intertek?
8 A. Only inferred research based on
9 the conduct and the manner that these studies
10 were conducted would suggest to me that they
11 were not conducted by biologists much less
12 entomologists or people with rodent expertise
13 and in reading Feuerstein's deposition I
14 think by her admission she knew of none of
15 these people having any scientific or biology
16 background so I'm concluding from reviewing
17 the studies and the conduct of the studies
18 and the conclusion of the studies and from
19 her deposition that the people that were
20 conducting these trials were not biologists,
21 not entomologist, not rodentologists, but
22 that said, I don't have any deep knowledge of
23 who actually works in these companies.
24 Q. I take it your knowledge of
25 Intertek, SGS and Qmann is limited to the

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1 POTTER
2 reports that those entities produced and Ms.
3 Feuerstein's deposition, fair?
4 A. Fair.
5 Q. I take it prior to this case
6 you personally never tested any Bell & Howell
7 device, correct?
8 A. Correct.
9 Q. Have you tested any ultrasonic
10 repeller device prior to this case?
11 A. Can you -- let me say that in
12 terms of have I evaluated these devices, have
13 I read literature on them, when I was at
14 Orkin, did we consider the use of these
15 devices, yes. There was one in particular
16 back when I was at Orkin that was called the
17 Electrocats. At that time I can't remember if
18 it was purely electromagnetic or a
19 combination of electromagnetic and
20 ultrasonic, but the marketing of the product
21 was similar, you plug it in and it drives
22 rodents out of your building. We looked
23 carefully at that product. This is from
24 memory so I may be a little fuzzy, but we may
25 have been the ones that spoke with Dr. Roger

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1 POTTER
2 Gold at Texas A&M about conducting a study on
3 it.
4 Since then I get asked by many
5 different entities whether it's a commercial
6 restaurant or a food plant or a pest control
7 industry or consumers whether these devices
8 are effective or not so I have done a great
9 deal of reading about them.
10 I have had experience observing
11 the ineffectiveness of these device in simple
12 experiments. As one example my brother is
13 also a professor at the University of
14 Kentucky. Every year in one of his classes he
15 conducts a basic experiment using a
16 ultrasonic device where he places one of the
17 devices on the side of two interconnected
18 garbage cans with a tunnel between and
19 introduces American cockroaches and has the
20 students score which side the cockroaches end
21 up on; the side with the repeller or the
22 other side that they are supposed to be
23 repelled to.
24 Since I also lecture in that
25 class occasionally, I am very familiar with

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1 POTTER
2 the results. Essentially every year that
3 that study has been conducted, a
4 disproportionate number of cockroaches end up
5 on the side with the repeller because it's
6 considered harborage and warmth generating so
7 I have a lot of experience in evaluating
8 these products.
9 Have I done peer reviewed
10 refereed research on these products over the
11 years, no, largely because there is such a
12 large body of evidence, prior art saying that
13 they were effective and it's often difficult
14 to continue to publish work in an area that
15 others have published before.
16 I guess the last thing I'll say
17 is that I have had a lot of experience
18 evaluating repellents, not ultrasonic type
19 pest repellents, but repellant insecticides
20 and a lot of that work has been peer
21 published and a lot of the properties and the
22 ways that these studies are set up and
23 conducted are similar to the types of design
24 that you would need for experiment on an
25 ultrasonic device.

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1 POTTER
2 Q. Have you personally done any
3 laboratory testing of any ultrasonic
4 repeller?
5 A. I have -- when you say
6 personally done, I would say that setting up
7 and overseeing the conduct of the experiments
8 we did with the Bell & Howell devices would
9 fulfill that.
10 Q. You're talking about the
11 testing that was done for this case?
12 A. Correct.
13 Q. In this case and I know it's
14 part of your first report, did you hire Dr.
15 Mankin to perform the testing that he did?
16 A. Dr. Mankin was referred to me
17 by Christine Styer, the director of i2L as
18 being an expert that could quantify the
19 acoustical output of the ultrasonic devices.
20 We had initially intended to have that work
21 done with i2L, but they felt that the
22 expertise that Dr. Mankin had and his
23 equipment and capabilities would get a better
24 answer in terms of a true output of the
25 devices they could accomplish so Dr. Mankin

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1 POTTER
2 was referred to me by Christine Styer.
3 I knew of him before so in
4 terms of hiring him, I guess indirectly yes
5 because we basically worked through Christine
6 Styer to conduct those tests and I spoke with
7 Dr. Mankin on several occasions about what we
8 wanted to evaluate and what the results of
9 his studies were.
10 Q. Were you personally present
11 during any of the testing done by Dr. Mankin
12 in this case?
13 A. No.
14 Q. Where is Dr. Mankin located?
15 A. University of Florida
16 Gainesville, USDA, but he's somewhat
17 affiliated.
18 Q. Did Dr. Mankin produce a report
19 with respect to the work that he did relating
20 to this case?
21 A. He produced the results which I
22 think I have appended to my report of his
23 testing of both the ultrasonic device and the
24 electromagnetic device.
25 Q. In our Subpoena to Dr. Mankin

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1 POTTER
2 there was a single page of a summary of his
3 test results produced. Have you ever seen
4 that?
5 A. There was a short, a few
6 paragraphs or one large paragraph summarizing
7 some of the results. It was basically
8 nothing different than the conversations that
9 I had had with him and really was reflected
10 in all those pages of attachments of the
11 studies.
12 Q. Is there anything with respect
13 to the findings made by Dr. Mankin that you
14 disagree with?
15 A. No.
16 Q. I take it you accepted Dr.
17 Mankin's findings?
18 A. Yes, he's a recognized expert
19 on both entomology, physics and the impact or
20 the effects of sound on animals, particularly
21 insects. He's well published and while I
22 carefully read his reports, we discussed back
23 and forth about the results, I would defer to
24 his conclusions as being accurate.
25 Q. What are Dr. Mankin's

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1 POTTER
2 qualifications to do the testing that he did
3 on the Bell & Howell device?
4 A. Well, as I said, he's
5 considered an expert on acoustical detection
6 or sensory reception of insects to sound.
7 He's published on this subject. It seemed
8 like a reasonable person to try to quantify
9 the output characteristics of these devices.
10 Q. Was there ever a written
11 protocol with respect to the testing that was
12 performed by Dr. Mankin?
13 A. Not a formal protocol, but we
14 had asked i2L to try to characterize the
15 output of the devices and I think some of
16 that information was probably conveyed to Dr.
17 Mankin. I think it was actually in the
18 original proposal or report that I had
19 submitted to i2L.
20 Q. Have you worked in the past
21 with i2L?
22 A. Not with i2L. i2L had a
23 different name, it was previously ICR, same
24 company, just different name and I guess
25 different owners. I was a colleague. I

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1 POTTER
2 would see him at professional meetings, Dr.
3 Robin Todd who was the director prior to
4 Christene Styer, but in terms of setting up
5 specific testing with i2L, no.
6 Q. Where is i2L located?
7 A. Baltimore, Maryland is their
8 U.S. office and then they have I think their
9 corporate office maybe in England or Cardiff
10 is that whales?
11 Q. i2L did laboratory testing of
12 the Bell & Howell devices with respect to
13 insects and spiders, correct?
14 A. Yes and cockroaches, ants and
15 spiders were the three arthropods that they
16 evaluated.
17 Q. Were you personally present
18 during any of the testing done by i2L?
19 A. The last part of the study that
20 was conducted on ants I was present, yes.
21 We evaluated in sequence German cockroaches
22 first, cellar spiders second and the third
23 organism was odorous house ants.
24 Q. Appendix 4 to your first report
25 Exhibit 1 is the report from i2L concerning

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1 POTTER
2 their testing in this case, correct?
3 A. Correct.
4 Q. Is there anything in i2L's
5 report that you disagree with?
6 A. I noticed there was an omission
7 in one of the appendices and I had meant to
8 bring this up I guess to counsel and even to
9 i2L and I haven't had a chance, but there was
10 some data cells missing in appendix 2 where
11 it was just an omission of transcription
12 because if you go back to the tables
13 basically on the previous page and you can
14 insert those numbers, but I did notice a
15 typographical omission from the Chi-square
16 analysis that was done on cellar spiders and
17 odorous house ants. That data was generated,
18 just simply through a transcription error did
19 not appear in appendix 2 in those charts.
20 Q. Is there anything that you
21 disagree with that's included in i2L's report
22 which is marked as appendix 4 to your first
23 report?
24 A. No.
25 Q. I take it you accepted their

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1 POTTER
2 findings, i2L's findings and conclusions?
3 A. Yes.
4 Q. Then I believe a company Sierra
5 conducted some testing of the Bell & Howell
6 devices with respect to mice, correct?
7 A. Correct, Sierra Research Labs
8 is the name of the company.
9 Q. If I say Sierra, will we
10 understand I'm referring to Sierra Research
11 Labs?
12 A. Yes.
13 Q. Sierra Research Labs provided
14 you with a written report concerning their
15 testing and the results of their testing
16 which is marked as appendix 5 of your first
17 report Exhibit 1, correct?
18 A. Correct.
19 Q. Is there anything you disagree
20 with that's found in the Sierra report marked
21 as appendix 5 to Exhibit 1?
22 A. No, there's nothing that I
23 disagree with in this report.
24 Q. You accepted Sierra's findings
25 and conclusions?

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1 POTTER
2 A. I do.
3 (Exhibit 3, Documents, marked
4 for Identification.)
5 Q. We were given a supplemental
6 production of documents that were in your
7 file which I've now marked as Exhibit number
8 3. I would like you to take a look at it and
9 confirm for me if you can if these materials
10 were part of your file?
11 MR. KOPEL: Do you have a copy
12 for me?
13 MR. OSTOJIC: That's one of the
14 things I don't have a copy of.
15 MR. KOPEL: I'm going to try to
16 look on, but if I need a copy --
17 MR. OSTOJIC: If you want to
18 take a break now to make a copy.
19 MR. KOPEL: Let me see what
20 this is. Off the record.
21 (Discussion off the record.)
22 (Record read.)
23 A. Many of these materials are
24 familiar to me, the testing protocols for
25 example and the e-mails. Some of this other

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<p>1 POTTER</p> <p>2 material, some of the raw data from the</p> <p>3 Sierra Research Lab mouse study I had not</p> <p>4 seen in this format until a few days ago, I</p> <p>5 think Friday I received a copy of these</p> <p>6 e-mailed to me by counsel.</p> <p>7 In other words, some of this</p> <p>8 raw data tabular summaries was not included</p> <p>9 in the initial expert report that was</p> <p>10 submitted to me or the final expert report</p> <p>11 submitted to me by Bill Donohue at Sierra</p> <p>12 Research Labs, but I have since seen them</p> <p>13 subsequently.</p> <p>14 Q. In the scientific world when</p> <p>15 doing a test of a product, do you first have</p> <p>16 to establish either a theory or a goal before</p> <p>17 the testing is performed?</p> <p>18 A. Usually it starts with an</p> <p>19 observation or a question followed by a</p> <p>20 hypothesis of what you are considering may be</p> <p>21 essentially what you are investigating so I</p> <p>22 would say yes.</p> <p>23 Q. So with respect to Sierra, what</p> <p>24 was the goal or the hypothesis of the</p> <p>25 testing?</p> <p style="text-align: right;">65</p>	<p>1 POTTER</p> <p>2 realistic and simulate the manner in which</p> <p>3 these devices would be utilized by a consumer</p> <p>4 to observe what effect it would have on mice.</p> <p>5 Q. Is it fair to say that to</p> <p>6 determine the effectiveness of the product,</p> <p>7 the product should be tested in accordance</p> <p>8 with its intended use?</p> <p>9 A. I would say that's correct.</p> <p>10 Q. Did you approach your</p> <p>11 assignment in this case as an independent</p> <p>12 scientist without any bias?</p> <p>13 A. Yes.</p> <p>14 Q. Did you contact defendants'</p> <p>15 experts in this case to participate in any</p> <p>16 joint testing of the Bell & Howell device?</p> <p>17 A. Can you repeat the question?</p> <p>18 Q. Sure. Did you attempt to</p> <p>19 participate in any joint testing of the</p> <p>20 devices?</p> <p>21 A. No.</p> <p>22 Q. Why not?</p> <p>23 A. Well, apart from wanting to</p> <p>24 look at this in an independent capacity, I</p> <p>25 have no stake in this game. I'm getting paid</p> <p style="text-align: right;">67</p>
<p>1 POTTER</p> <p>2 A. The goal was to evaluate the</p> <p>3 ability of the Bell & Howell ultrasonic pest</p> <p>4 repeller to repel and drive pests out in a</p> <p>5 residential setting to try to evaluate the</p> <p>6 veracity of the claims of the manufacturer's</p> <p>7 device.</p> <p>8 Q. Was the goal that you gave</p> <p>9 Sierra with respect to their testing was the</p> <p>10 goal to disprove the defendants' claim that</p> <p>11 the devices repel pests?</p> <p>12 A. No. The goal was to try to set</p> <p>13 up as realistic an experiment as possible to</p> <p>14 evaluate the device and report the results.</p> <p>15 We spent a tremendous amount of time</p> <p>16 developing this protocol. Three Ph.D.</p> <p>17 scientists arguably the top rodentologist in</p> <p>18 the world, myself who spent a career</p> <p>19 evaluating pest control products and Dr. Bill</p> <p>20 Donohue, Ph.D. entomologist trained at Texas</p> <p>21 A&M who has probably 30 plus years experience</p> <p>22 evaluating these devices and other type,</p> <p>23 well, all manner of pest control materials so</p> <p>24 we did the very best we could to set the</p> <p>25 experiment up in a way that would be</p> <p style="text-align: right;">66</p>	<p>1 POTTER</p> <p>2 one way or the other and I didn't even</p> <p>3 consider it because at least in this</p> <p>4 particular case I thought we had sufficient</p> <p>5 expertise to evaluate these devices based on</p> <p>6 our expertise and the prior literature on the</p> <p>7 performance of these products and how those</p> <p>8 tests were conducted as well so I didn't see</p> <p>9 the need.</p> <p>10 Q. Would it have been</p> <p>11 inappropriate in this case as an independent</p> <p>12 scientist to set the goal for the testing to</p> <p>13 disprove the defendants' claim that the</p> <p>14 devices repel pests?</p> <p>15 A. Can you repeat the question?</p> <p>16 Q. Sure. Would it be inappropriate</p> <p>17 to set the hypothesis for the testing of this</p> <p>18 Bell & Howell device as to whether you can</p> <p>19 disprove the defendants' claim that the</p> <p>20 devices repel pests?</p> <p>21 A. One more time.</p> <p>22 (Record read.)</p> <p>23 A. There is a semantic associated</p> <p>24 with the word disprove. Certainly when you</p> <p>25 conduct any experiment, you perform a</p> <p style="text-align: right;">68</p>



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1 POTTER
 2 hypothesis. Your hypothesis is that typically
 3 there is no effect for evaluating a device or
 4 insecticide and the alternate hypothesis
 5 being is there an effect and then you design
 6 your experiments accordingly to see what the
 7 outcome is. I think it's inappropriate to
 8 assume that you never have a thought or an
 9 opinion going into the experiment.
 10 For example, in this case there
 11 was a lot of literature, a lot of past
 12 experience saying there was not an effect,
 13 but we wanted to obviously test the Bell &
 14 Howell device which defense argues is
 15 different than devices in the past to see how
 16 it would perform so we went into this very
 17 open minded and I think it's reflected in the
 18 time and the attention to trying to set up a
 19 study that was realistic, but in no way did I
 20 go in -- I mean I consider the word bias
 21 which I think you used earlier as being
 22 really a prejudice against a person or a
 23 thing or a belief that's unfair, unwarranted.
 24 I think that, you know, it's
 25 reasonable as an expert in this case to

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1 POTTER
 2 seriously question the effectiveness of the
 3 class, the category of ultrasonic devices
 4 based on all 50 years of prior literature.
 5 That said, because again it was alleged that
 6 there were differences in these devices
 7 compared to some of the ones that were used
 8 in those other studies, we wanted to set it
 9 up as an unbiased experiment so I would say
 10 absolutely not, we did not go into this thing
 11 trying to prove one way or the other.
 12 Q. I mean obviously if you are
 13 going to go into the testing of a product to
 14 determine its effectiveness, it would be
 15 wrong to set the hypothesis as trying to
 16 disprove the effectiveness of the product; is
 17 that fair?
 18 A. Yeah, that's fair.
 19 Q. In the Exhibit number 3 there
 20 was an e-mail from you dated August 17, 2017
 21 to Robert Corrigan and Bill at Sierra
 22 Research Laboratories.
 23 A. It's going to take me a while.
 24 what was the date?
 25 Q. August 17, 2017.

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1 POTTER
 2 A. I got one here from August 17.
 3 I got another one from August 17.
 4 Q. Can I see if it's the same one
 5 I'm referring to?
 6 A. Look at those.
 7 Q. Yeah, it's that one. This is
 8 an e-mail August 17 that you sent to Robert
 9 Corrigan and cc'd a Bill from Sierra
 10 Research Labs, correct?
 11 A. Correct.
 12 Q. It says whatever is decided
 13 upon needs to comply with the usage
 14 instructions of the manufacturer and then in
 15 parenthesis you put Bell & Howell, right?
 16 A. Correct.
 17 Q. That means you are telling them
 18 that the testing has to be done in accordance
 19 with the instructions of this device provided
 20 by Bell & Howell, fair?
 21 A. Correct and specifically in
 22 this case we were talking -- I believe the
 23 conversation involved dimensions of the space
 24 because if you go to the previous e-mail on
 25 the string, at this time we were considering

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1 POTTER
 2 utilizing garages attached to a structure and
 3 I wanted to be sure that we set up the study,
 4 it was done consistent with the manner in
 5 which the manufacturer recommended using
 6 their products.
 7 Q. Would it be inappropriate in
 8 the scientific world to test a product
 9 contrary to its intended use?
 10 A. Can you repeat the question?
 11 Q. Sure. In the scientific world
 12 would it be inappropriate to test a product
 13 contrary to its usage instructions?
 14 A. I would say for the most part
 15 yes, but having had personal experience with
 16 testing a product contrary to a
 17 manufacturer's instructions sometimes can
 18 reveal very interesting outcomes.
 19 Q. But if you are testing for the
 20 effectiveness of a product, you should test
 21 that product pursuant to the manufacturer's
 22 usage instructions, fair?
 23 A. Yeah, if the manufacturer is
 24 paying for the work and specifying it and
 25 saying how it should be done. I keep putting

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<p>1 POTTER</p> <p>2 the caveat on this because we changed the way</p> <p>3 termite control is done around the world by</p> <p>4 striking out in a different direction from</p> <p>5 manufacturer's instructions, but admitted</p> <p>6 generally you want to evaluate a product in</p> <p>7 the manner that it's intended to be used if</p> <p>8 it's specified commercial product by the</p> <p>9 manufacturer so I'll grant you that.</p> <p>10 Q. For instance, let's say if you</p> <p>11 are testing the effectiveness of a pesticide</p> <p>12 and you use that pesticide in a swimming</p> <p>13 pool, it's really not going to be too</p> <p>14 effective; is that fair?</p> <p>15 A. Yes.</p> <p>16 Q. I'm coming at it as a lay</p> <p>17 person.</p> <p>18 A. If there are label instructions</p> <p>19 specifying the manner in which it should be</p> <p>20 used, you should attempt to evaluate the</p> <p>21 product in that fashion.</p> <p>22 Q. Going back to Exhibit 3, your</p> <p>23 e-mail of August 17, 2017, I know the first</p> <p>24 sentence you actually tell Robert Corrigan</p> <p>25 and Bill from Sierra Research Laboratories</p> <p style="text-align: right;">73</p>	<p>1 POTTER</p> <p>2 testing would disprove the claim that the</p> <p>3 device's repellent drives pests out?</p> <p>4 A. No, that's incorrect. First of</p> <p>5 all, whenever you set up an experiment as I</p> <p>6 said you have a hypothesis. When you set up</p> <p>7 these hypothesis, it's common to have, in</p> <p>8 other words, the words hope and expected, you</p> <p>9 have an expectation because you have a theory</p> <p>10 based on an observation of what may be</p> <p>11 occurring.</p> <p>12 In this case the theory was</p> <p>13 that this device would behave differently</p> <p>14 than prior devices in the literature in terms</p> <p>15 of repelling mice out of the structure so in</p> <p>16 no way -- we tried to set up a study that was</p> <p>17 realistic and you could say in this case that</p> <p>18 the known hypothetical was that these devices</p> <p>19 don't work based on the past literature and</p> <p>20 the alternative hypothesis would be that they</p> <p>21 in fact do work or maybe you could flip it</p> <p>22 around because you could do that. It's</p> <p>23 typically not done this way, but if the known</p> <p>24 hypothetical was the claims, the veracity of</p> <p>25 the claims was that these devices were</p> <p style="text-align: right;">75</p>
<p>1 POTTER</p> <p>2 that whatever is decided upon and I assume</p> <p>3 you mean by the future testing of this Bell &</p> <p>4 Howell device, correct?</p> <p>5 A. Correct.</p> <p>6 Q. You're telling them whatever</p> <p>7 testing is decided upon it would need to</p> <p>8 comply with the usage instructions of the</p> <p>9 manufacturer Bell & Howell, right?</p> <p>10 A. Correct.</p> <p>11 Q. Then you cited -- I guess you</p> <p>12 gave them two links to a Bell & Howell</p> <p>13 website where they would find usage</p> <p>14 instructions; is that fair?</p> <p>15 A. Correct.</p> <p>16 Q. Then you write to them, I'm</p> <p>17 looking at that last sentence, you write the</p> <p>18 thing we need to ultimately (hopefully)</p> <p>19 disprove is the claim that the devices repel</p> <p>20 and drive pests out of the home. Did I read</p> <p>21 that sentence correctly?</p> <p>22 A. Correct.</p> <p>23 Q. Was that the goal you provided</p> <p>24 to Robert Corrigan and Bill of Sierra that</p> <p>25 ultimately you were hopeful that their</p> <p style="text-align: right;">74</p>	<p>1 POTTER</p> <p>2 effective, the alternative hypothesis would</p> <p>3 be that they are not effective.</p> <p>4 When I phrase this e-mail,</p> <p>5 there is no intent in stacking the deck in</p> <p>6 any fashion whatsoever. I mean to the</p> <p>7 contrary, if you read through the series of</p> <p>8 e-mail correspondences between myself, Bobby</p> <p>9 Corrigan and Bill Donohue, it was try to get</p> <p>10 a study that would be reflective of the real</p> <p>11 world testing these things in residential</p> <p>12 settings.</p> <p>13 Q. Is it correct to state though</p> <p>14 if Robert Corrigan and Sierra Research took</p> <p>15 your August 17, 2017 e-mail to mean that the</p> <p>16 goal in this case was to disprove the claim</p> <p>17 that the device's repellent drive pests out</p> <p>18 of the home, that would be inappropriate?</p> <p>19 A. That would be inappropriate and</p> <p>20 knowing these two gentlemen if you knew them</p> <p>21 as I know them, they have a lot more at stake</p> <p>22 with their professional reputations as do I</p> <p>23 in trying to conduct an experiment with an</p> <p>24 inherent bias at the outset.</p> <p>25 Q. Sir, why is it necessary in</p> <p style="text-align: right;">76</p>



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1 POTTER
 2 testing the efficacy of the Bell & Howell
 3 repellers that the testing labs should follow
 4 the product's use instructions?
 5 A. Well, if you are trying to
 6 evaluate the effects of those products as
 7 they would be sold to the consumer, it would
 8 make sense to set that test up in a fashion
 9 that would be realistic of not just how a
 10 consumer would use them, but basically do
 11 they perform according to the claims of the
 12 manufacturer which in this case are to repel
 13 pests and drive them out and presumably out
 14 of the building because I don't know where
 15 you drive pests within a structure out of if
 16 you don't drive them out of the building.
 17 It's not of any value if you
 18 drive a mouse from its nest behind the
 19 compressor of the refrigerator to the void
 20 space between the kitchen and the room above.
 21 Q. If you want to turn to the
 22 beginning of Exhibit number 3, I want to go
 23 over these documents in some orderly fashion,
 24 okay?
 25 A. Okay.

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1 POTTER
 2 Q. The first four pages of Exhibit
 3 number 3 is essentially the protocol for the
 4 testing of the Bell & Howell devices with
 5 respect to mice, correct?
 6 A. This was a preliminary
 7 protocol, a draft for discussion where we are
 8 trying to come up with a residential setting
 9 where we could evaluate these devices.
 10 Elements of it are the same as in the final
 11 protocol, but there are some elements that
 12 are quite different.
 13 Q. The first four pages of Exhibit
 14 3, they were authored by Bobby Corrigan,
 15 correct?
 16 A. I would have to look at the
 17 date on this because there was a lot of
 18 dialogue back and forth. In other words,
 19 Bobby had in his mind a protocol for
 20 evaluating an ultrasonic device and then we
 21 had quite a bit of discussion back and forth
 22 in terms of would that reveal or demonstrate
 23 the efficacy of this device based on claims
 24 and based on intents of how it's used so I
 25 can't say whether all these words are written

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1 POTTER
 2 by Bobby. There may have been some that were
 3 not. I would say the majority of these words
 4 were written by Bobby.
 5 Q. Who else do you believe would
 6 have written the words in the first four
 7 pages of Exhibit 3 other than Bobby Corrigan?
 8 A. Myself or Bill Donohue because
 9 we were interacting back and forth, but
 10 again, the bulk of this looks like it was the
 11 first go around with Bobby in coming up with
 12 what would be a reasonable protocol.
 13 We started with a slightly
 14 different iteration of this in keeping
 15 rodents out, but this is certainly -- the
 16 bulk of this is definitely Bobby Corrigan's
 17 words.
 18 Q. If you go into Exhibit 3 the
 19 next couple of pages and I'm looking at two
 20 pages that have on the top research notes and
 21 has Sierra Research Laboratories logo on the
 22 left side?
 23 A. Okay.
 24 Q. This is a handwritten document
 25 from someone at Sierra Research Laboratories,

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1 POTTER
 2 correct?
 3 A. Correct. Mike is I believe the
 4 first name there and I believe he's the
 5 brother of Bill Donohue who's one of his
 6 experimentalists.
 7 Q. If you go -- I'm looking at a
 8 diagram that I assume was provided by Sierra
 9 Labs to you concerning the apartments where
 10 they were doing some testing of the Bell &
 11 Howell devices with respect to mice?
 12 A. Correct.
 13 Q. In doing the test that Sierra
 14 did, they did not follow Bell & Howell's
 15 usage instructions, correct?
 16 A. If you could give me specific
 17 instructions that you're saying it doesn't --
 18 well, first of all, we had to modify the
 19 experiment because no one was going to allow
 20 you to test against an established rodent
 21 infestation or certainly it would be
 22 difficult to get three units that we tested
 23 the device and three units that we didn't
 24 have at all quantifiable similar quantities
 25 of rodents so we had to obviously do things a

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<p>1 POTTER</p> <p>2 bit different here.</p> <p>3 People will not allow you to</p> <p>4 wall off your house to try to keep the mice</p> <p>5 in the evaluation spaces, but in terms of</p> <p>6 setting up the experiment to be consistent</p> <p>7 with what we consider to be the most relevant</p> <p>8 instructions, numbers of devices per unit</p> <p>9 area was consistent. Obviously there's some</p> <p>10 things here that you might say are not</p> <p>11 consistent like the presence of food and</p> <p>12 water, but in fact that is consistent with</p> <p>13 the real world.</p> <p>14 What's not the real world is</p> <p>15 inferring that a consumer can pick up all the</p> <p>16 potential food scraps and debris that mice</p> <p>17 feed on. These things can get a scrap of</p> <p>18 bread and bring it behind the refrigerator</p> <p>19 and live on it very nicely for a long period</p> <p>20 of time so what we try to do in design this</p> <p>21 experiment was simulate real world</p> <p>22 conditions.</p> <p>23 What does a mouse need? It</p> <p>24 needs a warm place. That's why we typically</p> <p>25 find them around compressors and heaters and</p> <p style="text-align: right;">81</p>	<p>1 POTTER</p> <p>2 Q. Just so I understand in the</p> <p>3 Sierra testing, food and water was</p> <p>4 specifically provided to the mice, correct?</p> <p>5 A. Correct.</p> <p>6 Q. Wouldn't the test that was done</p> <p>7 then be contrary to the Bell & Howell usage</p> <p>8 instructions?</p> <p>9 A. First of all, every published</p> <p>10 study in the prior art on the effects of</p> <p>11 ultrasonic devices on rodents provided food.</p> <p>12 The China study, all the studies that Bell &</p> <p>13 Howell conducted provided food. It would be</p> <p>14 a very unrealistic situation to put rodents</p> <p>15 into a box, a plexiglass box, it's</p> <p>16 unrealistic as it is, but to deny them</p> <p>17 sustenance alters the behaviors -- these are</p> <p>18 very successful animals.</p> <p>19 A house mouse is probably the</p> <p>20 most successful mammal probably second to</p> <p>21 humans based on its prevalence. They are</p> <p>22 more common in residential settings than cats</p> <p>23 and dogs so there is a reason why they've</p> <p>24 established these infestations in these</p> <p>25 dwellings in the presence of food.</p> <p style="text-align: right;">83</p>
<p>1 POTTER</p> <p>2 stoves and dishwashers. It wants harborage.</p> <p>3 It wants food in the vicinity because mice</p> <p>4 prefer not to forage long distances and</p> <p>5 moisture so we tried to simulate a typical</p> <p>6 residential setting in the presence of all of</p> <p>7 those comfortable things that a mouse or a</p> <p>8 nest of mice needs and would have if it was</p> <p>9 established in a dwelling before you</p> <p>10 introduce these devices to try to drive them</p> <p>11 away so generally we tried to design this</p> <p>12 protocol to be consistent with the way the</p> <p>13 product is used in the environment that the</p> <p>14 product is used.</p> <p>15 Q. The Bell & Howell devices state</p> <p>16 that you have to make certain that all food</p> <p>17 is put away?</p> <p>18 A. Yes.</p> <p>19 Q. And the Bell & Howell</p> <p>20 instructions you agree with me state that the</p> <p>21 efficiency of the device decreases if there</p> <p>22 is food and water available to the pest,</p> <p>23 correct?</p> <p>24 A. They say it on their label.</p> <p>25 It's not realistic of the real world.</p> <p style="text-align: right;">82</p>	<p>1 POTTER</p> <p>2 If you've ever pulled back your</p> <p>3 refrigerator, you will know that there's</p> <p>4 plenty of food for a mouse or it goes into a</p> <p>5 wall void or it goes down into the basement</p> <p>6 and then back up feeding on the bird seed so</p> <p>7 we are trying to create a real world</p> <p>8 environment to evaluate, not something that</p> <p>9 was artificial.</p> <p>10 Q. I just want to know is the</p> <p>11 placement of food and water for mice in the</p> <p>12 Sierra study, is that contrary to the Bell &</p> <p>13 Howell usage instructions, yes or no?</p> <p>14 MR. KOPEL: Objection, asked</p> <p>15 and answered.</p> <p>16 A. The Bell & Howell user</p> <p>17 instructions are unrealistic and frankly have</p> <p>18 no influence in my professional opinion on</p> <p>19 the performance of these products.</p> <p>20 Q. So you in either designing or</p> <p>21 assisting to design these tests did not take</p> <p>22 into account the Bell & Howell usage</p> <p>23 instructions, fair?</p> <p>24 A. Not fair.</p> <p>25 Q. Let me go back. Is the</p> <p style="text-align: right;">84</p>



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1 **POTTER**
 2 placement of food and water in that Sierra
 3 testing contrary to the usage instructions on
 4 the Bell & Howell device?
 5 MR. KOPEL: Objection, asked
 6 and answered.
 7 A. I've answered it to the best of
 8 my ability. I've said that every study
 9 that's been done in the past peer reviewed
 10 incorporated the presence of these essential
 11 resources. We tried to duplicate those kinds
 12 of results. These are strong claims of this
 13 product and we wanted to evaluate them in as
 14 close as we could to the real world what a
 15 consumer would face. They could say remove
 16 all food and water and it's a prudent
 17 practice in pest management to clean up
 18 spills and excess stuff, but whether it's
 19 house mouse, cockroach, ant, there is plenty
 20 of food -- you cannot sanitize a residential
 21 dwelling or a commercial kitchen to the point
 22 where there's none of these resources for
 23 these pests to sustain themselves so we set
 24 up the test with those thoughts.
 25 Q. Doctor, at the beginning of the

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1 **POTTER**
 2 deposition I thought you agreed when I said
 3 if I ask you a question you will directly
 4 answer my question and if you need to
 5 elaborate, counsel could ask you questions
 6 later, but I really want to get an answer and
 7 then we can move on.
 8 A. The devil is in the details in
 9 these questions so on the label it says don't
 10 put them behind a couch or a large object. We
 11 did not do that. The label says use roughly
 12 one device per average size room. We in fact
 13 used two. If you look at the dimensions of
 14 the two bedroom and one bedroom apartments,
 15 we probably could have gotten by with one
 16 unit so we tried to accommodate the usage
 17 instructions, but there were other factors
 18 that we could not ignore to try to come up
 19 with a real test.
 20 we had one shot at this to try
 21 to design something that would reflective of
 22 the real world and how these products are
 23 used by consumers. If we had five years to
 24 work on this, we might have teased out these
 25 various effects.

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1 **POTTER**
 2 Q. In the real world do you know
 3 of any person that places food and water in
 4 their residence to attract the mice?
 5 A. No, but I have been in hundreds
 6 upon hundreds of residential and commercial
 7 buildings where the sanitation was so abysmal
 8 that it was a feast for pests so it's not --
 9 whether we placed it intentionally or whether
 10 these food resources were present, these food
 11 resources are present for these animals in
 12 residential settings or they wouldn't be
 13 there.
 14 Q. The Bell & Howell device states
 15 that you should make certain that all food is
 16 put away, correct?
 17 A. That's what they say on their
 18 label.
 19 Q. The testing that was done by
 20 Sierra by placing food and water for the mice
 21 was contrary to the Bell & Howell usage
 22 instructions, correct? Is it yes or no?
 23 A. I would say that it's contrary
 24 to their instructions, but their instructions
 25 are unrealistic of the real world.

87

1 **POTTER**
 2 Q. I get it and I understand you
 3 don't agree with the instructions, but I just
 4 want the answer and then we could say
 5 good-bye to each other in a shorter span of
 6 time.
 7 A. Sorry.
 8 Q. The Bell & Howell device
 9 instructions states that the ultrasonic waves
 10 cannot penetrate walls and floors and other
 11 barriers, correct?
 12 A. Correct.
 13 Q. In the Sierra testing there
 14 were bait stations that were utilized,
 15 correct?
 16 A. Correct. Harborages, an empty
 17 bait station with a nest and cardboard box
 18 over it.
 19 Q. The bait station was
 20 manufactured by who?
 21 A. I can't recall if it was a
 22 protector. It was a plastic commercial
 23 station that pest control companies use to
 24 either install bait or other types of traps
 25 and devices within. I would have to go back

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1 POTTER
2 to the methods to see the brand because
3 there's a bunch of different makers of these
4 things.
5 Q. In the Sierra testing the bait
6 stations included bedding for the mice,
7 correct?
8 A. Correct.
9 Q. And also the bait stations were
10 then covered by cardboard boxes, correct?
11 A. Correct.
12 Q. Providing bait stations and
13 cardboard boxes as harborage for the mice,
14 that's contrary to the Bell & Howell usage
15 instructions, fair?
16 A. The question requires
17 clarification because they neither instruct
18 or not. We tried to simulate harborage that
19 would be present in a typical dwelling in an
20 unoccupied apartment. It's a very unnatural
21 thing to confine mice in a chamber or an
22 arena with no place to be. That's probably
23 the number one thing that they require
24 because these are nervous, skitterish, shying
25 creatures so our cardboard box was intended

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1 POTTER
2 or our bait station nest in a cardboard box
3 was intended to simulate clutter or a sofa or
4 the void space under a kitchen sink.
5 All of these void spaces are
6 present within a dwelling and we just tried
7 to provide a simulation of those where we
8 could still quantify the effects of the
9 device.
10 Q. The Bell & Howell instructions
11 that you read do not mention bait stations,
12 correct?
13 A. Correct.
14 Q. The Bell & Howell instructions
15 that you reviewed in this case do not mention
16 providing harborages to pests, correct?
17 A. Correct.
18 Q. So Sierra in conducting its
19 testing, they had two sets of apartments,
20 correct?
21 A. Correct.
22 Q. One was -- some were one
23 bedroom apartments, others were two bedroom
24 apartments, correct?
25 A. Correct.

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1 POTTER
2 Q. I'm looking at the diagram I
3 believe of the one bedroom apartment, do you
4 have that in front of you?
5 A. Yes.
6 Q. And this is a document that
7 someone at Sierra put together, right?
8 A. Correct.
9 Q. I take it the gist of this
10 testing was to put these mice in a room, have
11 them acclimated for a week or so with food
12 and water and harborage, right?
13 A. Correct just as a natural
14 infestation would be prior to purchasing and
15 using these devices.
16 Q. And then there was a back room
17 door was open for an inch to see if those
18 mice would then leave the front room and go
19 into this back room bedroom, correct?
20 A. Correct.
21 Q. There was no food and water
22 provided in the back room, right?
23 A. Correct.
24 Q. Why not?
25 A. We as I said previously tried

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1 POTTER
2 to devise this experiment like the real
3 world. In a real situation where a consumer
4 has a mouse, an existing mouse problem, they
5 purchase this device, they put it into
6 various rooms, in this case let's say the
7 front room of the house or this is a small
8 apartment so they had a kitchen connection,
9 those mice are comfortable. They have food,
10 warmth, harborage, moisture and we wanted to
11 simulate that.
12 We patterned this after other
13 repellency work that was done by a very
14 famous urban entomologist Dr. Walter Ebeling
15 often considered the father of urban
16 entomology who designed a device called the
17 Ebeling Choice Box studies where he was
18 looking at the repellency of an insecticide
19 and what he did is he had a split box with a
20 divider down the middle with a hole in the
21 top and half of that box was treated with the
22 insecticide and half was not and then he
23 darkened the side of the box where the
24 insecticide was applied that you are testing
25 the repellency of that product because a

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1 POTTER
2 cockroach wants to be in the dark so it was a
3 way to pressure the repellency of the
4 insecticide to see if it truly was repellent
5 because if it was, the cockroach would end up
6 on the light side so we somewhat adapted this
7 from that concept that if this device will be
8 effective, we want to give the mice the
9 conditions they want.
10 That's why we acclimated them
11 for a period of a week in this portion of the
12 apartment because if they were present in the
13 dwelling, they would be acclimated. Mice are
14 constantly dropping fecal pellets, they are
15 urinating all over the place, they have
16 pheromones, they have all their essential
17 resources and then we are going to come in
18 with this device and see if it could drive
19 them away so that was the main reason we did
20 it.
21 As a practical matter, if your
22 question is heading towards well, could it
23 have biased the results of this study,
24 clearly it didn't because literally within
25 one day of setting this up with no food in

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1 POTTER
2 the back, roughly three-quarters of the mice
3 initially with the device had moved to the
4 back room and in the untreated controls they
5 were pretty much evenly distributed
6 throughout the entire experiment even though
7 there was no food initially placed in the
8 back.
9 Mice are constantly exploring
10 their territories especially initially and
11 they are constantly moving back to and from
12 food so as a practical matter it didn't
13 really make a lot of difference whether the
14 food was on one side or the other.
15 Q. Did you ever tell Sierra to put
16 food in the back room where there was no
17 repeller to make the testing more fair?
18 A. We talked about it and I think
19 we came to the conclusion that this would be
20 a more realistic test to try to demonstrate
21 the claims of the product, the ability to
22 drive the pests out of an area where they
23 were currently residing with all the
24 resources they need.
25 Q. So you don't believe that the

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1 POTTER
2 test was biased because it did not have food
3 and water in the back room where there was no
4 repeller as it did in the room where there
5 was a repeller, fair?
6 A. No, bias, no, the test was not
7 biased. You set up experiments to
8 demonstrate different things. If you look at
9 all of the rodent literature or the insect
10 literature, much of which I suspect you may
11 have not read, you will realize that those
12 studies were conducted in a number of
13 different ways to try to tease out the
14 effects of these devices. That's what we were
15 trying to do here.
16 Q. Do you believe that the Sierra
17 testing was biased because the room where the
18 repeller was was approximately three times
19 the size of the room without the repeller?
20 A. No, I don't. If anything mice
21 like tight secure spaces and clearly it was
22 not biased because in the untreated controls
23 there were just as many mice in the back room
24 as the front room.
25 Q. So the repeller in this case

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1 POTTER
2 that Sierra conducted the testing it showed
3 that the repeller was effective in repelling
4 mice, correct?
5 A. In the first week, roughly the
6 first five to seven days, there did appear to
7 be a movement of mice from the front room to
8 the back room, a disproportionate movement so
9 there was an statistical effect of the device
10 for the first roughly five, six, seven days,
11 but by the second week with the repeller
12 installed apartments, the distribution of the
13 mice had evened out which is consistent with
14 studies that have been done in the past in
15 terms of the habituation of rodents to these
16 ultrasonic devices.
17 Q. Did you analyze the actual data
18 that was provided by Sierra with respect to
19 the counting of mice?
20 A. Yes.
21 Q. So I take it then for the first
22 week at least it's your opinion that the Bell
23 & Howell devices were effective in repelling
24 the mice based on the Sierra test, correct?
25 A. They certainly caused mice to

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1 POTTER
2 move. I guess the term effective is
3 semantics. In the larger scheme of things
4 the device was not effective because it's no
5 value to move mice around for five or seven
6 days, but certainly there was a significant
7 effect of the device in the first week of the
8 experiment.

9 Q. Is there any time line that's
10 set forth in any of the Bell & Howell
11 instructions as far as how long it would take
12 to repel pests?

13 A. My recollection was that they
14 were very nebulous on that and open ended
15 that it could depend on in some cases it
16 would take longer than others. Wearing my
17 science hat for a minute, I could see how
18 that could be the case depending on the
19 degree of clutter and complexity and where
20 the rodents were and the level of festation,
21 how well established they were, but in this
22 case where we had essentially a vacant
23 apartment with two simple harborages in the
24 front and the back, two weeks to me seemed
25 more than sufficient to determine whether

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1 POTTER
2 there was a long lasting effect of this
3 device.

4 Q. Do you believe the Sierra
5 testing was biased because it allowed only
6 the mice to acclimate in the front room where
7 the repeller was for a week?

8 A. Not in the sense that we again
9 tried to set up this experiment to reflect
10 the real world where you would be purchasing
11 this device, installing it in your home where
12 there was an existing mouse infestation.

13 Q. Were the harborages identical
14 in the front room as in the back room with
15 respect to the Sierra testing?

16 A. They were very similar. We had
17 the same unused brand new rodent plastic
18 rodent bait stations, we nested them with a
19 cardboard box. The reason we did that was to
20 provide them a further protective location
21 because mice are always going to try to find
22 the place that's the safest and quietest and
23 where they feel most secure. My recollection
24 is that we added some wood shavings as a
25 nesting material to the boxes in the front,

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1 POTTER
2 but not the back, again, trying to simulate
3 real world conditions.

4 Q. So they were not identical
5 because you provided nesting materials, wood
6 shavings in the bait stations in the front
7 room, but not the back room, correct?

8 A. Repeat the question one more
9 time.

10 Q. So the bait stations in the
11 front and back room were not identical
12 because you provided wood shavings to the
13 bait stations in the front room and not the
14 back room, fair?

15 A. That is correct, but again, as
16 a practical matter, they clearly were very
17 comfortable utilizing the back boxes because
18 it was a uniform distribution in the
19 untreated controls so all the untreated
20 controls and all the treated apartments had
21 while granted a slightly different make-up,
22 the distribution of the mice would show that
23 the mice were -- the important thing is the
24 harborage, okay. It's not the location of
25 the food because these mice are moving back

99

1 POTTER
2 and forth and I think that's what lacking
3 untreated controls some of these questions
4 might be raised which is one of the problems
5 with all the studies that were done in China.

6 MR. KOPEL: Were you done with
7 your answer?

8 THE WITNESS: Yes.

9 Q. How many mice would have gone
10 into the front room if there was food and
11 water placed in the back room, do you know?

12 A. You're saying we would have the
13 devices positioned in the same location and
14 put the food and water in the back room, but
15 only -- switch the rooms around with just
16 harborage in the front room, probably the
17 results would be -- I would suspect they
18 would be very similar because these mice were
19 clearly moving back and forth.

20 Q. How do you know if you didn't
21 do it? How would you know as a scientist if
22 you didn't do that test?

23 A. Well, when you look at all the
24 data of the study and you look at the fact
25 that we had untreated controls and you look

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1 POTTER
2 at the fact that we replicated the study and
3 you look at the locations of the mice and you
4 look at the web camera, the photographs of
5 locations of the mice, these mice were
6 running back and forth all over this
7 apartment and would the results have come out
8 exactly the same, you would have to test it,
9 but substantively I think we would have
10 gotten a very similar result.
11 Q. But unless we test something,
12 as a scientist you would agree that unless
13 you test something, you really don't know,
14 fair?
15 A. The nature of science and the
16 nature of manufacturing has been pointed out
17 by your experts as based on trying to come up
18 with the best answer you can with the data
19 you have and hopefully you generate enough
20 data to come to a meaningful conclusion. We
21 have not gotten to the China studies yet,
22 perhaps we never will, but if we want to
23 critique methodologies in terms of what's
24 completely appropriate, in other words, if
25 these label instructions of the manufacturer

101

1 POTTER
2 were based on the China studies, I'm not sure
3 how you could base those -- I don't know what
4 they base those recommendations on those
5 instructions because it was not based on
6 research that was credible.
7 Q. Was there any testing done that
8 you know of to determine the impact of the
9 cardboard boxes to act as a barrier of the
10 ultrasonic waves?
11 A. Not other than it's been known
12 for many years that ultrasound does not
13 penetrate solid objects. In the case of
14 specifically of the Bell & Howell devices,
15 Dr. Mankin placed a half inch thick corkboard
16 in front of the ultrasonic device which
17 greatly reduced its amplitude and its waves
18 and there's been other studies like that so
19 we did not specifically evaluate the
20 cardboard boxes, but you notice from the
21 diagram and the photographs that we did not
22 place a cardboard box directly in front of
23 the device.
24 Q. How far was the cardboard box
25 placed in front of the device in the Sierra

102

1 POTTER
2 testing?
3 A. I'll have to go to the
4 methodology. The cardboard boxes were placed
5 four feet from the walls. I can do that --
6 if you want, I can go to the methods. Would
7 you like me to do that?
8 Q. No, I don't want you to.
9 A. But you could see from the
10 diagram, you could see from the photographs,
11 I think there's a couple of photographs in
12 the report that show the position of the food
13 dishes and the boxes in relation to the
14 repellers and we made a very conscious effort
15 not to put those harborages in front of the
16 repellers trying to comply with the
17 instructions.
18 Q. I take it there was no testing
19 done to actually determine the impact that
20 the cardboard boxes would have to act as a
21 barrier with respect to the Bell & Howell
22 ultrasonic waves, fair?
23 MR. KOPEL: Objection, asked
24 and answered.
25 A. In the context with all the

103

1 POTTER
2 qualifications I just said, I would say that
3 we did not do specific testing on these
4 cardboard boxes in terms of deterring the
5 waves of these devices, but they again were
6 not in line with the devices so it's kind of
7 a moot point.
8 Q. But I take it from what Dr.
9 Mankin did, you would expect that the
10 cardboard boxes would act as a barrier to
11 ultrasonic sound waves, fair?
12 A. I would, yes.
13 Q. Did you do in this case any
14 testing with respect to whether the bait
15 stations that were used by Sierra would act
16 as a barrier to the Bell & Howell ultrasonic
17 waves?
18 A. We did not because it really
19 was an irrelevant question because we didn't
20 put the bait stations or the boxes in front
21 of the devices.
22 Q. I take it though based on what
23 Dr. Mankin did, you would expect that the
24 bait stations would act as a barrier to the
25 Bell & Howell ultrasonic waves, fair?

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<p>1 POTTER</p> <p>2 A. If they were in direct line</p> <p>3 with the device, yes.</p> <p>4 Q. Do you know of any repeller in</p> <p>5 the market today that would repel rodents</p> <p>6 when a bait station and cardboard harborage</p> <p>7 is placed in a room and food and water is</p> <p>8 supplied to the rodents?</p> <p>9 A. I don't know any repeller on</p> <p>10 the market that would repel rodents under any</p> <p>11 circumstances and I think that's what the</p> <p>12 past literature shows and what these studies</p> <p>13 showed so I guess the answer is no with that</p> <p>14 qualifier.</p> <p>15 Q. If you turn the pages on</p> <p>16 Exhibit 3, I'm looking at a page that has</p> <p>17 total number of mice counted and percentage</p> <p>18 of distribution, that's something that</p> <p>19 someone at Sierra created?</p> <p>20 A. Yes.</p> <p>21 Q. I take it 12 mice were put into</p> <p>22 these apartments by Sierra, correct?</p> <p>23 A. Initially, yes.</p> <p>24 Q. And then at some point Sierra</p> <p>25 would go in and count the mice to see which</p> <p style="text-align: right;">105</p>	<p>1 POTTER</p> <p>2 Looking at --</p> <p>3 A. If we had no untreated controls</p> <p>4 or no replication as was done in the China</p> <p>5 studies, these would all be legitimate</p> <p>6 questions, but they don't concern me because</p> <p>7 we did have them.</p> <p>8 Q. Sierra also provided</p> <p>9 handwritten notes with respect to the</p> <p>10 counting of the mice in the apartments. It's</p> <p>11 further down where they provided the counts</p> <p>12 that they did in the morning and afternoon?</p> <p>13 A. Okay.</p> <p>14 Q. I take it the summary document</p> <p>15 that we saw as part of Exhibit 3, that</p> <p>16 essentially just is a summary of what is in</p> <p>17 these handwritten notes; would you agree with</p> <p>18 that?</p> <p>19 A. Yes, this document we just</p> <p>20 talked about with the 14 days with the</p> <p>21 assessments made twice a day is a compilation</p> <p>22 of these results.</p> <p>23 Q. Do you know -- actually the</p> <p>24 handwritten notes are even further from the</p> <p>25 counting?</p> <p style="text-align: right;">107</p>
<p>1 POTTER</p> <p>2 room they were in either the back room or</p> <p>3 front room, correct?</p> <p>4 A. Correct.</p> <p>5 Q. Did it concern you that the</p> <p>6 front room was three times larger than the</p> <p>7 back room?</p> <p>8 MR. KOPEL: Objection, asked</p> <p>9 and answered.</p> <p>10 A. First of all, the thing that</p> <p>11 concerned me the most was that the ultrasonic</p> <p>12 output of the devices was deemed sufficient</p> <p>13 by the manufacturer instructions based on the</p> <p>14 square footage of where they were installed</p> <p>15 and as I said previously that in this</p> <p>16 particular instance two devices is more than</p> <p>17 adequate based on the manufacturer's</p> <p>18 instructions for this size space. It didn't</p> <p>19 concern me as I said that the back room was a</p> <p>20 different dimension than the front room in</p> <p>21 this particularly designed study because</p> <p>22 again the rodents clearly did not avoid the</p> <p>23 slightly smaller bedroom in the untreated</p> <p>24 controls.</p> <p>25 Q. The document that you are</p> <p style="text-align: right;">106</p>	<p>1 POTTER</p> <p>2 A. Okay, correct.</p> <p>3 Q. Do you know how Sierra entered</p> <p>4 the apartments to do the counting?</p> <p>5 A. Yes.</p> <p>6 Q. How?</p> <p>7 A. The inspector was instructed to</p> <p>8 go into the apartment and try to use the</p> <p>9 minimal degree of disruption possible because</p> <p>10 again these are vacant apartments, you have a</p> <p>11 dozen or so mice running all over the place</p> <p>12 so they were instructed to carefully observe</p> <p>13 the room as they came in for any presence of</p> <p>14 mice that were visible.</p> <p>15 In some cases they were not in</p> <p>16 the harborages, they were, for example, I</p> <p>17 think there is a photograph showing some in</p> <p>18 an open door pantry in the corners and then</p> <p>19 they were instructed to carefully lift up the</p> <p>20 cardboard box and some of the mice were</p> <p>21 nesting between the cardboard box and the</p> <p>22 plastic bait station within and count those</p> <p>23 and then open the box carefully and count</p> <p>24 those and then put everything back and do the</p> <p>25 same thing in the back room in the hallway so</p> <p style="text-align: right;">108</p>



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1 POTTER
2 the idea was to not spend an hour in every
3 apartment for a variety of reasons, but the
4 most crucial one from a science reason is to
5 not be disturbing the location of the mice
6 anymore than is possible.
7 Q. If the mice in the front room
8 of the apartments were inside the bait
9 station and the harborages to seek protection
10 from the repeller, would you consider the
11 repeller to be effective?
12 A. No. First of all, the thing
13 that mice want more than anything is a
14 protected place, a harorage, a space, a
15 void, a pile of boxes in your garage and in a
16 vacant apartment like this we took away all
17 of the prime harorage locations other than
18 these boxes so no, the natural tendency of
19 these mice is to go into these boxes, but
20 being territorial and there's going to be
21 only so many mice that will accommodate other
22 mice within those boxes, some ended up
23 nesting or residing in other locations in the
24 apartment corners and so forth.
25 Q. You considered mice inside the

109

1 POTTER
2 bait station which was covered by the
3 cardboard box to have -- in the front room to
4 have not been repelled even though the
5 ultrasonic sound waves could not penetrate
6 the cardboard box and the bait station, fair?
7 A. Correct and again the
8 supposition is that these mice are constantly
9 foraging looking for food and resources.
10 They go to resources constantly in the course
11 of a day or a night so it was not like mouse
12 was in this box for 14 days. They were
13 moving all around and I think the web camera
14 stuff demonstrate that as well.
15 Q. There was a cabinet in the
16 front room of the apartments where the
17 repeller was located, correct?
18 A. Correct.
19 Q. Did that -- what was that
20 cabinet made of, do you know?
21 A. From the pictures it looks like
22 wood. It's actually sort of a pantry. These
23 are small apartments and the front room sort
24 of blended into the kitchen area before they
25 put that divider up.

110

1 POTTER
2 Q. The ultrasonic waves of the
3 Bell & Howell device could not penetrate that
4 wood cabinet, would you agree with me?
5 A. Correct, if they were not
6 oriented directly into the opening.
7 Q. Wouldn't mice that are found in
8 that cabinet, wouldn't you assume that they
9 are seeking shelter from the ultrasonic waves
10 of the Bell & Howell device?
11 A. If they were seeking shelter
12 from the ultrasonic device, all of the
13 replications and the untreated controls would
14 have demonstrated that these mice would only
15 have been in those areas and probably
16 disproportionately on the backside because
17 again these mice are constantly moving
18 around. They are not like in those cabinets.
19 You could see that these mice
20 were bringing resources back into the
21 cabinets so they are out there in the open
22 feeding on the food dishes, feeding on the
23 water, whether they are nesting in the back
24 bedroom or the front bedroom and that's the
25 way mice behave in a residential setting.

111

1 POTTER
2 Q. If the mice were in the kitchen
3 cabinet, would you assume then that the mice
4 are seeking shelter from the repeller?
5 A. No, I would not assume that.
6 Q. Why not?
7 A. Based on the totality of the
8 other data in this study and 50 years worth
9 of other research, peer reviewed work that
10 shows that these rodents are not impacted by
11 ultrasonics.
12 Again, we did have a temporary
13 effect for five days and it treated so there
14 does definitely appear to be some effect of
15 the device, but they quickly habituated.
16 To answer your question, I
17 cannot prove with absolute certainty that the
18 mice in the cabinet were not somewhat being
19 impacted, but clearly as a practical matter
20 it doesn't effect the inability of these
21 devices to drive pests out of an area or of a
22 dwelling because if you look at the picture,
23 there is an ultrasonic device, two ultrasonic
24 devices cross wise within a foot or two of
25 where these mice were nesting.

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1 POTTER
2 what good does it do to move --
3 even if it did move the mice over, what good
4 does it do to move a mouse over 12 inches in
5 the kitchen. How do these devices drive
6 pests out of a dwelling, that one I'm still
7 struggling with. Where do they go?
8 Q. Sir, this is my only
9 opportunity to ask you questions and then I
10 want to get out of here and go back home so I
11 understand you are intrigued, you have a lot
12 to say about the case and all that and maybe
13 if they ever make a movie of this case, it
14 will be more interesting, but for now if we
15 can just answer my questions so we can get
16 out of this thing.
17 MR. KOPEL: Give full and
18 complete answers. You do not need to
19 limit your answers.
20 A. I'm trying to provide
21 clarification of my opinions because this
22 stuff is more complicated.
23 Q. I take it Sierra Lab in
24 conducting its count, it counted mice in the
25 kitchen cabinet as not being repelled,

113

1 POTTER
2 correct?
3 A. Correct.
4 Q. It counted mice that were
5 inside bait stations and the cardboard
6 harborages of the front room as not being
7 repelled, correct?
8 A. Correct.
9 Q. It counted mice that were in
10 the hallway by the back room as not being
11 repelled, correct?
12 A. Correct. There was a reason
13 for that.
14 Q. It also counted mice that were
15 stuck in a doorjamb in the back room as not
16 being repelled, correct?
17 A. I would have to know whether
18 that was -- I would have to look at that
19 specific mouse and see where it was scored
20 and why it was scored that way, but yes, if
21 the mice were present either within a
22 harborage or somewhere else in the apartment,
23 if they were in the front area with a
24 connection to the hallway, the score is being
25 not repelled, if they were in the back room,

114

1 POTTER
2 it was considered repelled.
3 Q. I'm looking at the handwritten
4 notes from Sierra which are dated October
5 12th, the evaluation time is 9:20 a.m., do
6 you see that? I think it was the first day of
7 the study.
8 A. October 12th, 9:20 a.m., yes.
9 Q. They found five mice located in
10 the harborages of the front room, correct?
11 A. Which apartment are we talking
12 about?
13 Q. I'm talking about all three
14 apartments where the Bell & Howell devices
15 were in place?
16 A. Okay, you are looking at the
17 sum at the bottom?
18 Q. Yes.
19 A. Correct.
20 Q. If you look at the summary,
21 this summary here, Sierra wrote that there
22 were eight mice found in the front room, do
23 you see that?
24 A. I'm trying to get the days
25 right here.

115

1 POTTER
2 Q. This is day one of the study so
3 it would be the first item?
4 A. Got it.
5 Q. They counted a mouse that was
6 dead in the back hallway as not being
7 repelled, fair?
8 A. Yeah, again, first of all, the
9 counts that you are showing on this page with
10 the notes is the front room and the back room
11 in the boxes and then they have comments on
12 each of these valuation dates in terms of
13 other mice that were found and where they
14 were located and if you tally those with
15 these, it should tally to this. At least when
16 I went through these, essentially all of them
17 they tallied, they may have all tallied so I
18 think if we go back to --
19 Q. I'm staying -- I would like to
20 stay on this document.
21 A. But the other three mice were
22 counted for in the front room in the comments
23 if you read this.
24 Q. One of the three mice is a dead
25 mouse in the back hallway that was counted as

116



1 POTTER
2 being in the front room, correct?
3 A. Right.
4 Q. So that mouse that's dead you
5 would consider as not being repelled by the
6 Bell & Howell devices, correct?
7 A. We discussed this of the
8 handling of dead mice. There were some
9 granted and it was primarily a couple
10 apartments B104 and 108, but the scoring of
11 how do you score a dead mouse that you find
12 in a box in the front room or how do you
13 score a dead mouse that you find in the back
14 room. We decided to score those as that's
15 where they were found and that was where they
16 were scored.
17 There could be some question as
18 to how did it get there and was it at some
19 point in the back room and the front room,
20 but you have to look at the totality of the
21 data which is very clear in terms of where
22 these mice were in the untreated and the
23 treated groups.
24 Q. On the next handwritten notes
25 which is their 4:53 p.m. count?

117

1 POTTER
2 A. what day?
3 Q. October 12th, there were two
4 mice in a doorjamb in the comments in
5 apartment B108?
6 A. Yes.
7 Q. Do you know which doorjamb the
8 mice were in?
9 A. Well, I'll have to do the
10 calculation comparing this to -- I went
11 through every one of these and comparing the
12 data that they -- the raw data handwritten
13 and the transcribed data and the vast
14 majority of them came out to be clear and
15 understandable of why they scored it and how
16 they did, but I'll have to go and look at
17 this one if you want me to.
18 Q. If the doorjamb they are
19 referring to is for the back room, wouldn't
20 you consider those mice to have been repelled
21 by the Bell & Howell device?
22 A. Not if it was the front
23 doorjamb. If you look at this diagram --
24 Q. No, but my question was if it
25 was the back door. I want to give you every

118

1 POTTER
2 opportunity to answer me.
3 A. My assumption because I also
4 had to put a sharp pencil to these comments
5 and how they came up with these results and
6 my assumption is if they scored these in the
7 front room or the back room, it was because
8 they deemed looking at this diagram that they
9 would have been on the outside of that
10 doorjamb facing the hallway rather than the
11 back.
12 Q. Is it fair to say we don't
13 know, at least you and I don't know at this
14 time what doorjamb Sierra was referring to?
15 A. That's correct and I would
16 again question if it wasn't looking at all
17 this other data, it was quite clear the
18 thoroughness of these comments which are
19 pretty darn extensive for this kind of a
20 study and they were consistent with the
21 tabulation of the data and the formation of
22 these graphs so if we are nitpicking
23 something, okay, granted, I don't know in
24 that particular case, but if there is, you
25 know, show me other things that are

119

1 POTTER
2 problematic with the way they scored this
3 data and transcribed it to the chart and
4 maybe we can --
5 Q. If dead mice and mice in the
6 hallway were counted as being repelled or
7 just not counted at all, wouldn't it show
8 greater effectiveness of the Bell & Howell
9 devices with respect to the Sierra test?
10 A. There were dead mice in the
11 untreated controls as well I believe. I
12 can't remember the proportionality compared
13 to the treatments and the numbers of dead
14 mice were -- throughout the course of the
15 experiment while the device was activated
16 were rather small limited primarily to two
17 units.
18 we still ended up with nine
19 live mice extracted from each of those
20 apartments at the end of the study so it's
21 not like all the mice were dead, but it was a
22 decision that had to be made how do you score
23 a mouse in terms of where it was located.
24 If it was in the hallway, it
25 was scored as the front room because it was a

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<p>1 POTTER</p> <p>2 direct line from the repeller in the front of</p> <p>3 the room straight down the hallway,</p> <p>4 therefore, we made that decision that based</p> <p>5 on the distance, it would be reasonable to</p> <p>6 include the hallway as part of the front</p> <p>7 room.</p> <p>8 Q. Have you tried to do the</p> <p>9 calculations from the Sierra testing by</p> <p>10 calculating dead mice or mice in the hallways</p> <p>11 as being repelled what that would look like?</p> <p>12 A. First of all, why would we</p> <p>13 score mice in the hallway as being repelled?</p> <p>14 Q. I take it you have not done</p> <p>15 that calculation, right?</p> <p>16 A. No, I'm sorry.</p> <p>17 Q. If we did calculate mice in the</p> <p>18 hallway or dead mice as being repelled, it</p> <p>19 would show greater effectiveness of the Bell</p> <p>20 & Howell device, fair?</p> <p>21 A. Fair.</p> <p>22 Q. You indicated that there was</p> <p>23 either 11 or initially there were 12 mice put</p> <p>24 into at least the majority of these</p> <p>25 apartments, correct?</p> <p style="text-align: right;">121</p>	<p>1 POTTER</p> <p>2 fair?</p> <p>3 A. Yeah, they would escape to the</p> <p>4 back room which is what they were shown in</p> <p>5 the untreated controls if they were trying to</p> <p>6 get away from the device.</p> <p>7 Q. All of the mice in the</p> <p>8 apartments were not actually discovered on</p> <p>9 numerous days during this testing, correct?</p> <p>10 A. Correct.</p> <p>11 Q. Why not?</p> <p>12 A. Because this is a real world</p> <p>13 experiment. As I said, they spent -- they</p> <p>14 tried not to be destructive in their</p> <p>15 assessments in the count so they had a</p> <p>16 limited amount of time in the apartment.</p> <p>17 They didn't pry back masonite to see -- in</p> <p>18 some cases some of these mice chewed through</p> <p>19 the bottom of the baseboard, but these things</p> <p>20 are small and cryptic and get into small</p> <p>21 spaces so the answer is if it was a plastic</p> <p>22 cube we could have counted, but in the real</p> <p>23 world it's darn difficult to find and count</p> <p>24 every last mice, not surprising at all.</p> <p>25 Q. Could some of the mice have</p> <p style="text-align: right;">123</p>
<p>1 POTTER</p> <p>2 A. Correct.</p> <p>3 Q. One of the apartments they only</p> <p>4 introduced 11 mice, correct?</p> <p>5 A. I would have to go back and</p> <p>6 look at the records, but the intent was to</p> <p>7 put 12 in, acclimate them for a week. In some</p> <p>8 cases some mice died. We did replenish mice</p> <p>9 before we activated the device to begin the</p> <p>10 experiment. We never replenished mice after</p> <p>11 that. If you show me where it says 11, it</p> <p>12 may have been 11 in one, but the intent was</p> <p>13 to put 12 mice in each apartment.</p> <p>14 Q. The apartments were constructed</p> <p>15 to prevent the mice from escaping the</p> <p>16 apartments, correct?</p> <p>17 A. As best we could that was the</p> <p>18 intent of the masonite. It was successful</p> <p>19 most of the time, but in some cases it</p> <p>20 wasn't.</p> <p>21 Q. Even if the mice wanted to</p> <p>22 escape, let's just assume because of the</p> <p>23 ultrasonic waves of the repeller, they really</p> <p>24 could not except to go into the back room,</p> <p>25 the kitchen cabinets or the bait stations,</p> <p style="text-align: right;">122</p>	<p>1 POTTER</p> <p>2 escaped the apartment?</p> <p>3 A. They could have which is why we</p> <p>4 did a final more of a destructive count at</p> <p>5 the very end of the study where they removed</p> <p>6 the masonite panels and I think there is a</p> <p>7 page in here that talks about the post mortem</p> <p>8 counting of numbers of mice in the units and</p> <p>9 the numbers are fairly reflective. There</p> <p>10 were some that were never recovered, but the</p> <p>11 numbers were pretty good.</p> <p>12 One unit 205 we had problems</p> <p>13 and it was documented in the comments, a</p> <p>14 large hole was chewed so several of the mice</p> <p>15 escaped. 102 had 12 that they recovered, 106</p> <p>16 had 10, 104 and 108 had 9 each and 103, 12</p> <p>17 alive, four dead, that was the apartment that</p> <p>18 initially we introduced -- we lost a lot of</p> <p>19 mice so we wanted to be sure we had enough to</p> <p>20 have that be a reasonable experimental unit</p> <p>21 so we probably added more than 12 which is</p> <p>22 why we have a number that's basically higher</p> <p>23 than the initial 12.</p> <p>24 Q. If you go to the October 16,</p> <p>25 2017 date and I'm referring to the 4:54 p.m.</p> <p style="text-align: right;">124</p>



1 POTTER
2 comment?
3 A. Okay.
4 Q. With respect to the treated
5 apartments, there were ten mice found in the
6 two boxes in the front room, correct?
7 A. Correct.
8 Q. Sierra calculated though 19
9 mice as being in the front room in their
10 summary, correct?
11 A. Is this the table?
12 Q. October 16th, yes.
13 A. This is day five?
14 Q. Day five, yes.
15 A. It's the second evaluation so
16 your question again?
17 Q. Sierra calculated 19 mice as
18 being found in the front room, correct?
19 A. Correct.
20 Q. Again, Sierra included dead
21 mice as well as mice inside the cabinet, the
22 wood cabinet, right?
23 A. Mice that were not in the
24 boxes, but were in the front room were
25 counted as being in the front room so in the

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1 POTTER
2 cabinet, along the baseboard, in a corner of
3 the room, correct.
4 Q. In total there were -- to begin
5 with there should have been 36 mice in the
6 three apartments where the Bell & Howell
7 device were placed, right?
8 A. If we introduced 12 in each of
9 those and I'd have to go back to the first
10 page.
11 Q. And we saw in some of these
12 some mice ended up dying, right?
13 A. Correct.
14 Q. Do you know how Sierra then
15 counted 40 mice in the treated apartments on
16 October 16, 2017?
17 A. October 16th, are we talking
18 about the first evaluation or the second?
19 Q. The second. They calculated
20 finding 40 mice?
21 A. Can you show me -- in the
22 treated group 19 in the front room and 21 in
23 the back room.
24 Q. That's 40 mice, right?
25 A. Correct.

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1 POTTER
2 Q. That's clearly wrong, right?
3 A. Because you are saying that --
4 I'm going to need a break because I'm
5 starting to have a hard time doing what
6 should be a simple task here.
7 Q. 19 plus 21 is 40, right?
8 A. Correct.
9 Q. There's no way there were 40
10 mice found in the three apartments with the
11 Bell & Howell device, correct?
12 A. You are saying if they only
13 introduced 36 to begin with?
14 Q. Yes.
15 A. But I said there was one
16 apartment where -- let me go back to the data
17 sheet on day zero. You notice in apartment
18 B104 which was one of the treated apartments
19 they said that some escaped, they had some
20 holes, they added three new mice and then in
21 102 -- I can't explain how the numbers don't
22 add up, but whether it should be 36 or 40,
23 they clearly added additional mice at the
24 beginning of the experiment if they found
25 reason to do so like why start an experiment

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1 POTTER
2 for example in 205 where they found a hole
3 and two mice when they went in there so they
4 introduced ten more. They tried to start the
5 experiment with proportionately the same
6 numbers of mice to begin things, but this is
7 the real world.
8 You have to remember these are
9 field collected mice, wild mice collected
10 from a poultry house and conditioned or
11 residing for a week or two weeks before they
12 are introduced. Stuff happens. They eat
13 each other. Some might just die from
14 handling, but we tried to start the
15 experiment with a proportionately similar
16 number of mice.
17 Q. Is it fair to say that you
18 don't know when they introduced if they did
19 at all mice into the apartments that were
20 treated by the Bell & Howell devices?
21 A. Could you repeat that?
22 Q. Do you know when Sierra if it
23 did at all introduce any mice into the three
24 apartments where the Bell & Howell devices
25 were placed after activation of the devices?

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1 **POTTER**
2 A. I think the protocol said that
3 they basically introduced the devices or they
4 introduced the mice and then they activated
5 the devices, but let me read this again.
6 Turned on 3:15 p.m. Bell &
7 Howell devices in the front room. First of
8 all, they replenished the mice before they
9 turned the devices on is my interpretation of
10 this.
11 Q. Okay so there should not have
12 been 40 mice in the three apartments on
13 October 16, 2017, correct?
14 A. There might have been 39.
15 Q. Do you know one way or the
16 other?
17 A. No, I don't.
18 Q. I'm looking at October 19,
19 2017, the five p.m. count. I show that there
20 were three mice found inside the harborages
21 of the front room, but Sierra calculated 12
22 mice as being in the front room?
23 A. Can you -- are we talking about
24 the first time?
25 Q. Study day 8, 5:00 p.m.?

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1 **POTTER**
2 A. Okay and the question?
3 Q. There are only three found in
4 the harborages of the front room, but they
5 calculated 12 in their chart as being found
6 in the front room?
7 A. I really do need to take a
8 break.
9 MR. OSTOJIC: Okay. Let's take
10 a break.
11 (Luncheon recess taken at
12 12:25 p.m.)
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1 **POTTER**
2 **AFTERNOON SESSION**
3 (Time Noted: 1:10 p.m.)
4
5 **MICHAEL POTTER**, resumed and
6 testified as follows:
7
8 **CONTINUED EXAMINATION**
9 **BY MR. OSTOJIC:**
10 Q. Doctor, we're back from our
11 lunch break. I wanted to finish up on some
12 of the testing that Sierra Research Labs did
13 on the repellers and mice, okay?
14 A. Okay.
15 Q. Was there ever any discussion
16 to either remove that wood cabinet in the
17 front room or seal it to prevent mice from
18 entering?
19 A. Not to my knowledge.
20 Q. At some point there were rats
21 that got into the apartment, do you recall
22 that?
23 A. Yes.
24 Q. Do you know how the rats got
25 into the apartments?

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1 **POTTER**
2 A. I have no idea.
3 MR. KOPEL: I think you were in
4 the middle of looking at a specific
5 tabulation just before lunch and Dr.
6 Potter might have something to add.
7 If you don't want to go back to that,
8 that's fine.
9 Q. Are you intending on doing
10 further calculations from what Sierra
11 Research Labs did in counting mice that were
12 repelled and not repelled depending upon
13 where they were located?
14 A. No.
15 Q. Bobby Corrigan, he initially
16 designed the protocol for the testing of the
17 Bell & Howell devices with respect to mice,
18 correct?
19 A. Correct.
20 Q. And then Mr. Donohue --
21 A. Dr. Donohue.
22 Q. Dr. Donohue of Sierra Research,
23 he inputted or made some revisions to the
24 design protocol, correct?
25 A. As did I, yes.

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1 POTTER
2 Q. Initially it was thought to use
3 house mice for the testing that Sierra
4 Research was going to do, correct?
5 A. Yes.
6 Q. Ultimately wild mice were found
7 and used?
8 A. They were house mice, but wild
9 mice. House mice could live in the wild as
10 well so they were field collected wild mice
11 of the species *Mus musculus*, they were house
12 mice.
13 Q. Conducting a test in a barn or
14 a commercial setting would not have been
15 appropriate for these Bell & Howell devices,
16 correct?
17 A. Could you restate the question?
18 Q. Conducting testing of the Bell
19 & Howell devices in a barn or a commercial
20 setting such as a warehouse would not be
21 appropriate, fair?
22 A. No, not necessarily because I
23 think the label talks about using the devices
24 in homes and offices and other places. I
25 don't think they specifically exclude other

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1 POTTER
2 types of structures provided you use enough
3 of the devices for the square footage.
4 Q. On August 17, 2017 you wrote an
5 e-mail where you stated that you would be a
6 bit concerned about getting too far astray
7 from a set up that's not translatable to
8 usage in a residential setting (devices claim
9 to drive pests out of homes, offices, etc.)
10 You wrote that e-mail, right?
11 A. Correct.
12 Q. Why did you at that time think
13 that you needed a residential setting rather
14 than barns and such?
15 A. I think it was because in
16 talking on the telephone or by e-mail or both
17 with Bill Donohue he mentioned he had some
18 other possibilities for rodent infestation. I
19 think one of them involved a rat infestation
20 if I'm not mistaken and I wanted to be sure
21 that one, we designed this study with
22 adequate replication and untreated controls
23 and an experimental design that would be most
24 reflective of a residential setting where
25 presumably most of these devices were used so

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1 POTTER
2 I wanted to try to accomplish that if we
3 could.
4 Q. Did the Bell & Howell
5 instructions mention anything about using it
6 in barns or warehouses or kind of
7 agricultural settings or rural settings I
8 should say?
9 A. I would have to look at the
10 label. If you have one, I could look at it,
11 but as I recall, it talked about homes and
12 offices and other places so I got the
13 impression that if you want to put these
14 things into a restaurant or a tool shed
15 behind your house assuming it was closed,
16 that there would be no reason why a consumer
17 would not assume that, but I could see the
18 main uses of these things would be probably
19 by householders in residential settings.
20 Q. Robert Corrigan in an e-mail to
21 you wrote rural and urban structures are not
22 equal and the environmental variables
23 affecting barns, sheds, livestock buildings
24 are not close to those of a suburban home.
25 Would you agree with that?

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1 POTTER
2 A. I would.
3 Q. So testing done in barns,
4 sheds, livestock buildings rather than a
5 residence would not be appropriate for the
6 testing of the Bell & Howell devices to
7 determine its efficacy, fair?
8 MR. KOPEL: Objection, asked
9 and answered.
10 A. It would be less desirable, but
11 if you look back on 50 years worth of
12 literature, it's difficult to do studies on
13 these devices in residential settings so you
14 can design your experiments in warehouses and
15 vacant buildings and still get meaningful
16 data on these devices, but again, we wanted
17 to try to make this as close as possible to a
18 residential setting.
19 Most commercial settings,
20 office buildings, restaurants and so forth
21 have professional pest control services and
22 again the pest control industry over many
23 years has concluded these devices are
24 ineffective so I don't think you would find
25 many of them used in those kinds of

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